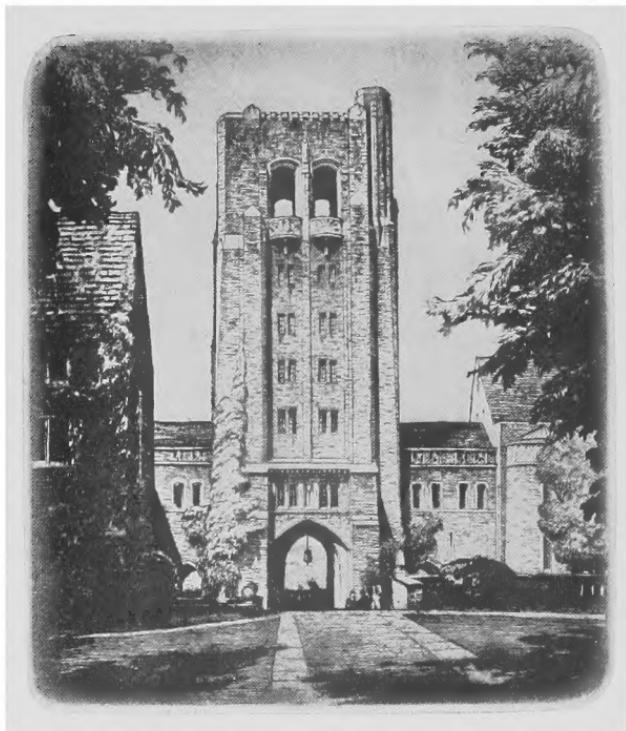


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A TREATISE

ON THE

MODERN
LAW OF BANKING

BY

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VOL. II.

PHILADELPHIA
THE GEORGE T. BISEL COMPANY,
LAW PUBLISHERS AND BOOKSELLERS

1907

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CHAPTER XVII.

COLLECTIONS.

Division I.

CONTRACT WITH DEPOSITOR.

1. Authority. 2. The contract. Usage. 3. Contract is between bank and depositor only. 4. What law governs the contract. 5. Contract must be executed in good faith.	6. Possessor of a note is <i>prima facie</i> the owner. 7. Revocation of authority. 8. Collections after insolvency. 9. Importance of precise time of making collection.
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1. Authority.

The right to make collections is an incident of banking;¹ and its exercise has formed a feature of the business from early days. Various advantages accrue from doing the business besides the use of the money which forms a good consideration.² The contract becomes operative from the time of accepting the paper.³ For the purpose of making collections, therefore, a collecting bank is the real holder, which includes the right to

¹ Mound City Paint Co. v. Commercial Nat. Bank, 4 Utah 353; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276; Merchants' Nat. Bank v. Goodman, 109 Pa. 422.

² Kershaw v. Ladd, 34 Or. 375; Bailie v. Augusta Sav. Bank, 95 Ga. 277; Titus v. Mechanics' Nat. Bank, 35 N. J. Law 588; Yerkes v. Nat. Bank, 69 N. Y. 382; Mechanics' Bank v. Merchants' Bank, 6 Met. (Mass.) 13, 20; Dyas v. Hanson, 14 Mo. App. 363, 373; Young v. Noble, 2 Dis. (Ohio) 485; German Nat. Bank v. Burns, 12 Colo. 539; Manhattan Life Ins. Co. v. First Nat. Bank, 80 Pac. (Colo.) 467; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 288.

³ Young v. Noble, 2 Dis. (Ohio) 485, 487; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 228.

make demand, protest notes for non-payment, sue, in short, to take action like the real owner to obtain payment.⁴

2. The Contract. Usage.

Among banks definite contracts to collect and send remittances are usually made by them.⁵ Usage plays a prominent part in the business; and a depositor who avails himself of the use of a bank is bound by any reasonable usage that exists among the banks in that place, whether it was actually known by him or not.⁶ Thus by making a note payable at a particular bank, the parties are presumed to consent to be governed by the custom prevailing in the institution in demanding payment.⁷

One limitation to the sway of usage may be noticed. No general or specific usage will excuse a collecting bank from exercising all reasonable diligence in making collections.⁸

In like manner banks in doing business with each other must have due regard to known usages or customs. Therefore, if a bank instruct another employed in making a collection to

4 Warren v. Gilman, 17 Me. 360; Hartford Bank v. Barry, 17 Mass. 94. See §20.

5 See §10, note 8, and §11.

6 Chap. III. §§11-16; Davis v. First Nat. Bank, 118 Cal. 600; Farmers' Bank v. Newland, 97 Ky. 464; Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 418; Dorchester & Milton Bank v. New England Bank, 1 Cush. (Mass.) 177; National Bank v. Johnson, 6 N. Dak. 180; Savings Bank v. National Bank, 98 Tenn. 337; Kershaw v. Ladd, 34 Or. 375; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Kent v. Dawson Bank, 13 Blatchf. (U. S.) 237.

Contra.—To bind a customer in sending a draft for collection by a particular custom, he must have known of it at the time of sending his draft. Bank v. Miller, 105 Ill. App. 224, affd. 202 Ill. 410. See also Chap. III. §14.

7 Harrison v. Crowder, 6 Sm. & M. (Miss.) 464.

8 Bank v. Miller, 105 Ill. App. 224, affd. 202 Ill. 410, and cases cited. "Usage can only regulate the manner of the performance of required acts; it cannot excuse nonperformance." Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 69; Adams v. Otterback, 15 How. (U. S.) 539. Parties "have the right to stipulate against the ordinary liabilities of the business" of collection. Walker, J., Fay v. Strawn, 32 Ill. 295, 302.

“remit New York exchange,” the custom, with respect to the form of remittance, whatever it may be, must be followed.⁹

3. Contract is Between Bank and Depositor Only.

A collecting bank is agent only of the owner of the paper deposited for collection.¹⁰ There is no privity between the bank and the endorsers. Consequently, when the first endorser on a note escapes liability through the bank's neglect to notify him and the second endorser is obliged to pay, he has no remedy against the bank.¹¹

Sometimes paper is delivered to a depositor by a friend or customer for collection. It may be that the depositor possesses better agencies for doing the business. In such cases the bank to which it is sent to collect acquires no better title thereto, or to the proceeds, than the transmitter's title, unless there has been a bona fide purchase for value, or an advance made in good faith and without any knowledge of a defect in the title.¹² Without question when the collecting bank has knowledge of the real ownership, through the endorsement on the paper or by letter, he cannot credit the amount collected on an indebtedness due from the sending depositor. The real owner can sue the collecting bank and obtain his money.¹³

4. What Law Governs the Contract.

The law governing the construction of the contract is that of the place where the collection is to be actually made.¹⁴

9 Holder v. Western German Bank, 68 C. C. A. 554.

10 McCullock v. Commercial Bank, 16 La. 566; Dodge v. Freedman's Sav. & Trust Co., 93 U. S. 379; Montgomery Bank v. Albany City Bank, 7 N. Y. 459.

11 *Ibid.*

12 Dickerson v. Wason, 47 N. Y. 439; Bank v. Gilman, 81 Hun (N. Y.) 486, affd. 152 N. Y. 634; Bank v. Waydell, 103 N. Y. App. Div. 25.

13 Bank v. Waydell, 103 N. Y. App. Div. 25.

14 Davis v. First Nat. Bank, 118 Cal. 600. In Moulis v. Owen, 22 T. L. R. (Eng.) 770, the plaintiff sued on a check drawn in Algeria, but payable in London. The defence was that it was given for a gaming debt which, by the law of England, was illegal. But the court held that the English law did not extend to foreign gaming, and so the defence failed. See same case, 32 Law Mag. & Rev. 98.

5. Contract Must be Executed in Good Faith.

The contract must be executed, like every other, in good faith and in accordance with the instructions of the parties. Thus a bank to which a draft is sent with a request for immediate collection and remittance, that undertakes the business, is liable for a fraudulent appropriation of the proceeds after their collection,¹⁵ or for crediting them to the endorser.¹⁶

6. Possessor of a Note is Prima Facie the Owner.

A party in possession of a note, not overdue, is *prima facie* the owner, and has the right to collect, or authorize its collection.¹⁷ The collecting bank, of course, must account for the proceeds, or return the note if demanded.¹⁸ An unauthorized collection may be ratified by making a settlement with the wrongdoer.¹⁹

7. Revocation of Authority.

Ordinarily the authority to collect continues until the completion of the collection and the crediting and remitting of the proceeds.²⁰ But the owner may revoke the collector's authority unless it has acquired a lien thereon for present or past advances.²¹ The bank also may renounce its agency and return the paper.²² Lastly, there may be a judicial revocation,²³

¹⁵ Mechanics' Nat. Bank v. Miners' Bank, 13 Pa. Week. Notes, 515.

¹⁶ Long v. Bank, 18 Ky. L. Rep. 922.

¹⁷ Bank v. Friar, 88 Mo. App. 39; Davis v. Carson, 69 Mo. 609.

¹⁸ McClure v. Osborne, 86 Ill. App. 465.

¹⁹ Though the payee of a government check may clearly show that she never endorsed it, she may ratify its unauthorized collection by settling with the wrongdoer. Such a settlement will preclude any claim against the bank through which the collection was made. Hughes v. Neal Loan & Bkg. Co., 97 Ga. 383.

²⁰ Balbach v. Frelinghuysen, 15 Fed. 675.

²¹ Louisiana Ice Co. v. State Nat. Bank, McGloin (La.) 181; Naser v. First Nat. Bank, 116 N. Y. 492; Bank v. Gilman, 81 Hun 486, affd. 152 N. Y. 634. A contract for collection that has been put into operation by entering the note in the depositor's book and also in the bank book is not revoked by cancelling the latter entry. Bank v. Huggins, 3 Ala. 206.

²² First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. 183.

²³ Louisiana Ice Co. v. State Nat. Bank, McGloin (La.) 181.

while the collector's insolvency²⁴ or the death of a member of a banking partnership²⁵ operates in the same manner.

8. Collections After Insolvency.

The effect of an agent's insolvency must be distinguished from the insolvency of a debtor. Checks or other instruments, or their proceeds, in the possession of an insolvent agent belong to the principal and are held in trust for him.²⁶ Consequently, if a check is collected or paid after an agent's insolvency, the fact is unimportant, for the proceeds at all times belong to the principal.²⁷ The custom if existing between a solvent bank and

²⁴ Exchange Bank v. Sutton Bank, 78 Md. 577; Manuf. Nat. Bank v. Continental Bank, 148 Mass. 553; Morris Co. v. First Nat. Bank, 36 So. (Ala.) 764; People's Bank v. Jefferson Co. Sav. Bank, 106 Ala. 524; Wilson v. Smith, 3 How. (U. S.) 763; Branch v. U. S. Nat. Bank, 50 Neb. 470; Milliken v. Shapleigh, 36 Mo. 596, 599; First Nat. Bank v. Reno Co. Bank, 1 McCrary (U. S.) 491; Evansville Bank v. German-American Bank, 155 U. S. 556; First Nat. Bank v. First Nat. Bank, 76 Ind. 561; Levi v. National Bank, 5 Dill. 104; Union Nat. Bank v. Citizens Bank, 153 Ind. 44, 50; Commercial Bank v. Armstrong, 148 U. S. 50; Jockusch v. Towsey, 51 Tex. 129.

²⁵ First Nat. Bank v. Payne, 85 Va. 890.

²⁶ Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553; First Nat. Bank v. Craig, 3 Kan. App. 166; Guignon v. First Nat. Bank, 22 Mont. 140; First Nat. Bank v. First Nat. Bank, 76 Ind. 561; Williams v. Jones, 77 Ala. 294; Richardson v. Continental Nat. Bank, 36 C. C. A. 315; Commercial Bank v. Armstrong, 148 U. S. 50. See Chap. XVIII. §3 note. The owner of a draft deposited "for collection and returns" is not entitled to priority in the event of the insolvency of a bank after its collection; but before payment of the proceeds in Alabama by virtue of a constitutional provision that "depositors who have not stipulated for interest shall for such deposits be entitled, in case of insolvency, to preference of payment over all other creditors." Anheuser-Busch Brewing Assn. v. Clayton, 6 C. C. A. 108.

²⁷ Ibid; National Butchers' & Drov. Bank v. Hubbell, 117 N. Y. 384; People v. Bank of Dansville, 39 Hun (N. Y.) 187; Jones v. Kilbreth, 49 Ohio St. 401; Sherwood v. Central Mich. Sav. Bank, 103 Mich. 109; Wallace v. Stone, 107 Mich. 190; Griffin v. Chase, 36 Neb. 328; Continental Nat. Bank v. Weems, 69 Tex. 489; Hunt v. Townsend, 26 S. W. (Tex. Civ. App.) 310; Hutchinson v. National Bank, 41 So. (Ala.) 143; German Fire Ins. Co. v. Kimble, 66 Mo. App. 370; Levi v. National Bank, 5 Dill. (U. S.) 104; First Nat. Bank v. Bank of Monroe, 33 Fed. 408; German-American Bank v. Third Nat. Bank, Fed. Cas. No. 5359.

depositor, that the bank, though acting as an agent in making collections can hold the proceeds as a debtor, does not apply.²⁸

A different rule applies to an insolvent debtor. As the giving of a check or draft does not, except in a few states, assign the fund on which it is drawn,²⁹ it follows that if it is paid after the drawer has become insolvent, it is clearly an unlawful preference.³⁰ But if the receiving bank credits the remittance, or the drawee receiving bank^{*} credits the order, without any knowledge of the insolvency of the sender, which, at the time, was in a solvent condition and consequently acted with no intent to make a preference, the transaction will stand.³¹ The drawee seems to be in the same position as a drawee after the death of the drawer of a check, and can safely pay before knowledge of the event, but not afterward. This view, however, does not prevail everywhere. Standing on the broad principle that the status of every creditor is immediately fixed by the failure of a bank,³² it is contended that "after that time a correspondent bank has no power to so deposit or credit funds received for the account of the insolvent bank as to affect the right of the customers or creditors of the insolvent bank."³³

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28 National Butchers' & Drov. Bank v. Hubbell, 117 N. Y. 384, revg. 10 N. Y. State Rep. 290; Jones v. Kilbreth, 49 Ohio St. 401; First Nat. Bank v. Bank of Monroe, 33 Fed. 408; Levi v. National Bank, 5 Dill. (U. S.) 104; German-American Nat. Bank v. Third Nat. Bank, Fed. Cas. No. 5359.

29 Laclede Bank v. Schuler, 120 U. S. 511, 514; Reviere v. Chambliss, 120 Ga. 714; Union Nat. Bank v. Citizens' Bank, 153 Ind. 44, 54, and cases cited; Harrison v. Wright, 100 Ind. 515, containing an elaborate review of authorities; Guthrie Nat. Bank v. Gill, 6 Okla. 560; Fourth Street Bank v. Yardley, 165 U. S. 634; Covert v. Rhodes, 48 Ohio St. 66; Clark v. Toronto Bank, 82 Pac. (Kan.) 582.

30 Ibid; First Nat. Bank v. First Nat. Bank, 76 Ind. 561; Ibid; Stevenson v. Fidelity Bank, 113 N. C. 485; Boykin v. Bank, 118 N. C. 566; Reeves v. State Bank, 8 Ohio St. 465; Union Bank v. Johnson, 9 Gill & J. (Md.) 397; Evansville Bank v. German-American Bank, 155 U. S. 556.

31 McDonald v. Chemical Nat. Bank, 174 U. S. 610. See Dutcher v. Importer & Traders' Nat. Bank, 59 N. Y. 5. See Chap. XXIX. §6.

32 See Chap. XXXI. §2.

33 Brunner v. Bank, 97 Tenn. 540.

This question is clearly separated from that of crediting either by the drawee or receiving bank knowing of its insolvent condition, or crediting by a receiving bank with knowledge of the insolvent condition of the remitting bank. In the above question good faith is exercised by both the sending and the receiving banks. When shall insolvency begin to operate on the parties concerned, from the time of receiving knowledge of it, or from the time it was openly declared? There can be no doubt concerning the general answer.

Since insolvency operates only on the rights and property of the insolvent, every person and company having any property in the insolvent's possession or control seeks to obtain it; and much of the litigation springing from bank failures is conducted by the owners of trust property (1) to prove its nature, and (2) existence, and (3) to recover it. If succeeding in the first two things, the court will aid them in accomplishing the third. As this large class of cases has been already considered, it may be eliminated from the present inquiry.³⁴

As cash only can be received in payment, the insolvency of a bank before receiving it leaves the collection incomplete.³⁵ In like manner, if a collecting bank receives a check on itself in payment of paper received for collection, which is credited to the maker, and a draft is sent to the sending bank in payment and never paid by reason of the drawer's failure, the collection is not complete.³⁶

Not infrequently collections are completed by the receiver and sent to the owners.³⁷ But money collected on notes and

34 Chaps. XIII. §9, and XVI. §§7-9.

35 German-American Bank v. Third Nat. Bank, Fed. Cas. No. 5, 359; s. c. Levi v. National Bank, 5 Dill. (U. S.) 104.

36 Billingsley v. Pollock, 69 Miss. 759. See further Chaps. XVI. §5; XXIX, §6; XXXI. §§20-22.

37 Union Nat. Bank v. Citizens' Bank, 153 Ind. 44. A collecting bank cannot refuse to return the paper or its proceeds to the depositor on the ground that it was given to defraud creditors unless it is one of them. First Nat. Bank v. Leppel, 9 Colo. 594. "A contract for collection that has been put into operation by entering the note in the depositor's book,

other paper prior to the bank's insolvency, which it is keeping simply as a debtor, is not trust money, and consequently is not entitled to a preference.³⁸

It is a fraud for a drawee insolvent bank to which a check is sent for collection and cannot pay, to charge it against the maker as paid and send a draft to the other bank in payment. Consequently, failing to collect the draft, the owner of the

*

and also in the bank book is not revoked by cancelling the latter entry." Bank v. Huggins, 3 Ala. 206.

38 See Chap. XVI. §10; Bank v. Russell, 2 Dill. (U. S.) 215; In re Madison Bank, 5 Biss. (U. S.) 515; Gordon v. Rasines, 5 N. Y. Misc. 192; State v. Southern Bank, 33 La. Ann. 957; People v. City Bank, 93 N. Y. 582; First Nat. Bank v. Davis, 114 N. C. 343; Franklin Co. Nat. Bank v. Beal, 49 Fed. 606; N. C. Corporation Commission v. Merch. & Farmers' Bank, 50 S. E. (N. C.) 308. A customer who deposits a note for collection, which is discounted, cannot on the failure of the bank claim the note and the proceeds. In re Madison Bank, 5 Biss. 515. A bank to which a draft is sent by another bank with directions to remit the amount collected to a third bank, instead of doing so mingles the fund with its own and pays out from this general fund several days and then fails. No trust is impressed on the fund remaining in the bank in favor of the other. Merchants & Farmers' Bank v. Austin, 48 Fed. 25. A check sent to the drawee bank for collection which fails before sending the money or applying the same as directed, does not give the owner any priority over other creditors or impress its assets with a trust in his favor. Romanski v. Thompson, 11 So. (Miss.) 828. A drew a draft on his debtor and sent it to a bank for collection. The debtor drew a check for the amount, having ample funds, which the bank charged to his account, and sent a draft on another bank in payment. The drawer failed before the draft was paid and A sought to recover of the receiver, claiming the deposit was a trust fund. He failed, the court holding that the ordinary debtor and creditor relation existed between them. Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259. A bank sent several checks to the drawee bank for collection. They were charged to the makers and a draft for the aggregate amount drawn on a bank in New York possessing an ample fund for its payment was sent to the sending bank. Before this was collected the drawee of the draft failed. The sending bank claimed that the draft operated as an equitable assignment of the fund in New York, and consequently that it was entitled thereto as against other creditors of the failed bank, but the contention was not sustained. Sunderlin v. Mecosta Co. Sav. Bank, 116 Mich. 281. "There is nothing," said the court, "to show anything in the nature of an agreement that this check, drawn generally, should be paid out of a particular fund." 284.

The officers of an insolvent bank, knowing its real condition, took a

check, who has not been negligent in any way about its collection, can sue the maker for the amount as though he had never received anything from him.³⁹

The same principle applies to a sub-agent in making collections. If a check is collected by him after the agent's insolvency, although this was unknown to him at the time of collecting it, the proceeds cannot be applied on an account that may be running between the two parties. The general principle applies that the sub-agent's right to collect ceases at once on the failure of the agent regardless of the sub-agent's knowledge of the fact.⁴⁰

9. Importance of Precise Time of Making Collection.

The time of completing a collection is often important in determining what party is entitled to retain permanently the proceeds. And the relation and action of the sub-agents to the principal may also possess a peculiar significance in the matter. Thus A deposited a check containing a general endorsement with a banker, who endorsed it in the same manner and depos-

certificate on a second bank, crediting the holder, and soon after closed. Next day a third bank received the certificate, collected the amount of the second, and applied it on a pre-existing debt due from the insolvent bank. The third bank was held to be not a bona fide holder and was liable to the depositor for the amount of the certificate. *Harris v. First Nat. Bank*, 41 S. W. (Tenn. Ch. App.) 1084. A bank forwarded to B bank a note for collection, payable at C bank. B instructed C to collect and credit the amount to B, which was done. Between these banks there had been continuous dealings for several years. On the day of the collection the C bank failed, indebted among others to B. Nevertheless B was liable to A for the amount of the note. *First Nat. Bank v. First Nat. Bank*, 55 Neb. 303. When does a bank not take title to money deposited with, or collected by it, when insolvent? See note 86 Am. St. Rep. 775-807.

39 *Lowenstein v. Bresler*, 109 Ala. 326; *Western German Bank v. Norvell*, 134 Fed. 724.

40 *Nash v. Second Nat. Bank*, 67 N. J. 265; *Stevenson v. Taylor*, 113 N. C. 485. When an insolvent bank receives for collection a check which is endorsed and sent to another bank for collection, the second bank acquires no title thereto because the first had none. *Peck v. First Nat. Bank*, 43 Fed. 357.

Contra.—*American Ex. Nat. Bank v. Thuemmler*, 195 Ill. 90, revg. 94 Ill. App. 622. See *Commercial Bank v. Armstrong*, 148 U. S. 50.

ited it in B bank with which he kept an account, which, in turn, sent the check to the drawee bank for payment, thereby creating that bank its agent to make the collection. A few hours after the drawee bank received and collected the check, the banker failed, and A, the depositor, sought to hold the B bank for the amount. He failed in his contention, because the bank had collected the check before the banker's failure, who was a debtor also to the institution for a large sum of money.⁴¹

41 Hutchinson v. Manhattan Co., 150 N. Y. 250, revg. 9 Misc. 343.

CHAPTER XVII (CONTINUED).

Division 2.

OWNERSHIP OF PAPER DEPOSITED FOR COLLECTION.

10. Paper deposited generally belongs to depositor. 11. Owner may part with title by agreement. 12. Effect of endorsement in blank. 13. Effect of restrictive endorsement. 14. Effect of endorsement in blank followed by qualified endorsement. 15. Effect of advancing. 16. Effect of crediting. 17. To receive paper when insolvent is a fraud.	18. Ownership of intermediate holder. 19. Interpretation of special endorsement. <ol style="list-style-type: none">It does not form entire contract between bank and depositor.It does between other parties.Effect of advances. 20. Use of parol and other evidence to explain. 21. Letters of advice. 22. Effect of re-transfer. 23. True test of ownership.
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10. Paper Deposited Generally Belongs to Depositor.

Most of the paper deposited by a bank's customers consists of checks drawn on other banks; besides these are bills of exchange, notes and other instruments. In many cases the depositor remains the owner of the instruments until their discharge, also the proceeds until they have been returned and mingled with his general deposit.¹ In other cases he parts

¹ *Manuf. Nat. Bank v. Continental Bank*, 148 Mass. 553; *Armstrong v. National Bank*, 90 Ky. 431; *National Gold Bank v. McDonald*, 51 Cal. 64; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *Prescott v. Leonard*, 32 Kan. 142; *Scott v. Ocean Bank*, 23 N. Y. 289; *Balbach v. Frelinghuysen*, 15 Fed. 675. A bank which collected notes for a corporation and often retained the proceeds for a month or longer, giving credit therefor, was a debtor to the corporation for the amount and not an agent, and therefore no trust relation existed between them. *McCormick Harvesting Co. v. Yankton Sav. Bank*, 15 S. Dak. 196. Unless a special agreement exists,

with his ownership at the beginning, or at some later period, before the proceeds reach the final general reservoir.² In other words, in some cases the bank acts as the depositor's agent from the beginning until his receipt of the proceeds; in other cases the bank becomes the depositor's debtor during some stage of the transaction,

All paper occasionally presented to a bank for collection, and especially by non-depositors, and all paper of which the proceeds are to be immediately returned and from which the collecting bank cannot derive any benefit through its inability to use them, are agency or trust collections to which the principles governing that relation clearly apply.³ Even when they are applied it often follows that the owner of the paper fails to obtain the proceeds from the collecting bank because it has parted with them.⁴ The trust exists, but the money does not. In many cases the second bank or sub-agent sends a draft on New York or other city for the amount and fails before it is collected by the first bank or primary agency. Sometimes an attempt is made to hold the second bank, at other times to hold the drawee of the draft, on the ground that it has in its possession the drawer's money.⁵ But the attempt to hold the drawee usually fails, for, even if it does have money, it may not be the fund collected by the drawer for the depositor, and there is no reason why he should be preferred to other creditors, just as deserving, unless he can show that the drawee had his money in its possession. And for the same reason he often fails in his attempt against the drawer or second bank. Only when he can clearly show that *his money* in some form is still in the collector's possession has he a superior right to others.

"when a check is deposited it is taken generally for collection by the bank as the agent for the depositor, and the bank does not owe the amount until its collection is accomplished." Clopton, J., National Com. Bank v. Miller, 77 Ala. 168, 173.

² Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252.

³ See Chap. XIII. §9.

⁴ See Chap. XVI. §10.

⁵ See ante, §§8.

In collecting checks and other instruments the agency relation generally exists between the first or sending bank and any or all sub-agencies;⁶ but, in some jurisdictions, after the proceeds have been obtained, they are transformed, however brief their retention, into a credit by reason of a custom existing between the banks concerned in the undertaking. This custom, though, is not extensive. More generally it is operative only when no special agreement exists between the parties, and even then, it is believed, in the smaller number of jurisdictions.⁷ In one sense it is a way out of a dilemma which neither party foresaw, and for which they forgot to provide. Therefore, where they have provided for it, there is no reason for applying another solution. In truth, in the larger number of cases in which the agency relation has been transformed by the collector into a debtor relation, this has been done by a definite understanding between the parties;⁸ on many occasions mutual accounts existed between them;⁹ in some cases of collections without such an agreement the rule has been wrongly applied. Though such a custom be recognized as existing between the sending and collecting banks, it does not affect a third party, the depositor.¹⁰ It is a familiar rule that a collecting bank

6 *National Ex. Bank v. Beal*, 50 Fed. 355.

7 *Thompson v. Gloucester City Sav. Institution*, 8 At. (N. J. Eq.) 97; *Hoffman v. First Nat. Bank*, 46 N. J. Law 604; *Anheuser-Busch Brewing Assn. v. Morris*, 36 Mo. App. 31; *Kinney v. Paine*, 68 Miss. 258; *McLeod v. Evans*, 66 Wis. 401; *Freeman v. Exchange Bank*, 87 Ga. 45; *Arnot v. Bingham*, 55 Hun (N. Y.) 553; *Echarte v. Clark*, 2 Edm. Sel. Cases (N. Y.) 445; *Sweeny v. Easter*, 1 Wall. (U. S.) 166.

8 *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561; *Union National Bank v. Citizens' Bank*, 153 Ind. 44; *Levi v. National Bank*, 5 Dill. (U. S.) 104; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *People v. City Bank*, 93 N. Y. 582 and 96 N. Y. 32; *Briggs v. Central Nat. Bank*, 89 N. Y. 182; *National Butchers' & Drov. Bank v. Hubbell*, 117 N. Y. 384; *Scott v. Ocean Bank*, 23 N. Y. 289; *Evansville Bank v. German-American Bank*, 155 U. S. 556; *Commercial Bank v. Armstrong*, 148 U. S. 50; *First Nat. Bank v. Bank of Monroe*, 33 Fed. 408; *Anheuser-Busch Brewing Assn. v. Clayton*, 6 C. C. A. 108; *Richardson v. Continental Bank*, 36 C. C. A. 315.

9 *Ibid.*

10 *Armstrong v. National Bank*, 90 Ky. 431, 438; *First Nat. Bank v. Gregg*, 79 Pa. 384; *Hackett v. Reynolds*, 114 Pa. 328, 334; *Lawrence v.*

cannot make a contract impairing in any way his rights without his knowledge and acquiescence.¹¹ It is also true that in depositing checks and other instruments for collection he is regarded as submitting to the usages that pertain to the business, whether he knows of them or not.¹² But this rule, as we have seen, is not without limitations, to which may be added the one above mentioned.¹³ When the sending bank is the owner of the instruments sent for collection, or when they are so endorsed that the receiving bank is justified in supposing that the other is the owner, then there is a sound reason for crediting the proceeds to the sender; but when the sending bank is not the owner, but simply the agent for another party, no justification has ever yet been given for confiscating the principal's property without his knowledge and consent for the benefit either of the sending or collecting bank, or both. Why this procedure should have ever been dignified and sanctioned under the guise of usage has never been explained. Lastly, in all cases, whether the custom is recognized or not, the collecting bank after its insolvency has no right to complete the collection and credit the proceeds to the sender.¹⁴

It may also be remarked that when the sending bank is indebted to the collecting bank on mutual account or otherwise, the latter may credit the sending bank with the amount of a collection as a mode of remittance. But such action is not binding on the depositor or owner of the collection until the sending bank has received notice of the credit, and has credited the depositor's account with the amount, and has the money in its possession. In other words, the collection, to bind the depositor, must be an actual, as distinguished from a

Stonington Bank, 6 Conn. 521; Naser v. First Nat. Bank, 116 N. Y. 492 499; Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. 880.

11 Buller v. Harrison, Cowp. (Eng.) 565, 568.

12 See §2, also Chap. III. §14.

13 Ibid.

14 Commercial Bank v. Armstrong, 148 U. S. 50. See §7.

merely recorded collection, thereby adding the actual amount collected to his account.¹⁵

11. Owner May Part With Title by Agreement.

The depositor may part with his title by agreement, and in many cases ownership depends on the understanding between the bank and depositor.¹⁶ This agreement is often made by endorsement.

12. Effect of Endorsement in Blank.

Indeed, an endorsement is often, but not always, a decisive test of ownership. Very generally, paper is endorsed in blank, not with the intention of parting with the title, but as a needful step in its collection.¹⁷ This fact has sometimes been overlooked. A depositor, though endorsing his paper in blank, still maintains his control, and unless a lien has been acquired thereto for present or past advances, can recall his paper at any time before payment.¹⁸

By thus endorsing a check or other instrument his bank may acquire a lien or interest by advancing thereon, and likewise every subsequent holder; and may retain it, or the proceeds, for a prior advance or indebtedness.¹⁹ The collection

¹⁵ Guignon v. First Nat. Bank, 22 Mont. 140, 145.

¹⁶ In re State Bank, 56 Minn. 119; Morris v. First Nat. Bank, 201 Pa. 160; Siner v. Stearne, 155 Pa. 62; Morgan v. Tener, 83 Pa. 305; Bradstreet v. Everson, 72 Pa. 124; Echarte v. Clark, 2 Edm. Sel. Cases 445; Hoover v. Wise, 91 U. S. 308. A check on a North Carolina bank payable to the order of A was by his endorsement made payable to the order of B "trustee," who resided in Georgia. The latter, after endorsing the blank, delivered it to his beneficiary, who deposited it in a bank where she kept an account. This was credited with the check which was forwarded in a letter to the drawee bank, stating that it was "for collection and return." There was no account between the two banks. The depositor was held to be the owner of the check and entitled thereto on his demand therefor after the failure of the drawee bank. Bailie v. Augusta Sav. Bank, 95 Ga. 277.

¹⁷ Balbach v. Frelinghuysen, 15 Fed. 675.

¹⁸ Balbach v. Frelinghuysen, 15 Fed. 675; Blaine v. Bourne, 11 R. I. 119; Bank of Metropolis v. New England Bank, 17 Pet. (U. S.) 174.

¹⁹ Continental Nat. Bank v. First Nat. Bank, 36 So. (Miss.) 189; Wyoming v. Colorado Nat. Bank, 5 Colo. 30; Bridgeport City Bank v. Welch,

may be made even after the failure of the sending bank.²⁰ Formerly, in some states, such a check or the proceeds could not be held for a past debt, but this rule has been overthrown by a recent statute.²¹

13. Effect of Restrictive Endorsement.

A check or other instrument is often endorsed restrictively. Perhaps the most common endorsement is "for collection," though this is less frequent than it was before the decision in the Seaboard Bank²² case and others of a similar nature.²³ Such endorsement indicates that the endorser retains the ownership of the paper, and that his successive endorsers are his agents for the sole purpose of collecting it, and remitting to him the proceeds.²⁴ "Such a restricted endorsement does not author-

29 Conn. 475; Doppelt v. National Bank, 175 Ill. 432; Rathbone v. Sanders, 9 Ind. 217; Gaar v. Louisville Bkg. Co. 11 Bush (Ky.) 180; Cody v. City Nat. Bank, 55 Mich. 379; Garrison v. Union Trust Co., 139 Mich. 392; Miller v. Farmers' & Mech. Bank, 30 Md. 392; Wood v. Boylston Nat. Bank, 129 Mass. 358; Boatman's Sav. Institution v. Holland, 38 Mo. 49; Milliken v. Shapleigh, 36 Mo. 596; Hoffman v. First Nat. Bank, 46 N. J. Law, 604; Carroll v. Exchange Bank, 30 W. Va. 518; Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234; Wilson v. Smith, 3 How. 763; Commercial Bank v. Armstrong, 148 U. S. 50, 58; Vickery v. State Sav. Assn., 21 Fed. 773.

20 Winfield Nat. Bank v. McWilliams, 9 Okla. 493.

21 Coddington v. Bay, 20 Johns. (N. Y.) 637; Mayer v. Heidelbach, 123 N. Y. 332, 339; Hackett v. Reynolds, 114 Pa. 328, 334; First Nat. Bank v. Strauss, 66 Miss. 479. See the Neg. Inst. Act passed by the several states.

22 National Park Bank v. Seaboard Bank, 114 N. Y. 28. After the rendering of this decision the New York Clearing House established the following rule: "On and after the first day of July, 1896, members of this association shall not send through the exchanges any item having therein any qualified or restrictive endorsement such as 'for collection' or 'for account of,' or words of similar import unless all such endorsements thereon are guaranteed by the member of the association sending such item." See §10.

23 An endorsement "for collection account" has the same effect. Rossi v. National Bank, 71 Mo. App. 150, 160. In some cases the endorsement "for collection" has been ignored or not deemed important in determining the ownership of the paper. Union Nat. Bank v. Citizens' Bank, 153 Ind. 44.

24 Lawrence v. Stonington Bank, 6 Conn. 521; Freeman v. Exchange

ize a subsequent endorsee to negotiate the paper. His only power is to collect it, and the drawee bank is bound by the notice in the endorsement. Such an endorsement is not a guarantee that the name of the drawer is genuine, but only that the names of the endorsers then on the paper are genuine."²⁵ Another form of endorsement, "pay to any bank, or banker or order," is of the same character; it does not pass the title, but only authorizes the collection of the instrument.²⁶

Other common forms of endorsement whereby the endorser retains his ownership of the paper and the proceeds so long as

Bank, 87 Ga. 45, 47; Fay v. Strawn, 32 Ill. 295; Tyson v. Western Nat. Bank, 77 Md. 412; Third Nat. Bank v. Clark, 23 Minn. 263; Hackett v. Reynolds, 114 Pa. 328; Jones v. Kilbreth, 49 Ohio St. 401; Blaine v. Bourne, 11 R. I. 119; Akin v. Jones, 93 Tenn. 353; Foster v. Rincker, 4 Wy. 484; Tecumseh Nat. Bank v. Best, 50 Neb. 518; Boykin v. Bank, 118 N. C. 566; National Citizens' Bank v. Citizens' Nat. Bank, 119 N. C. 307; Branch v. U. S. Nat. Bank, 50 Neb. 470, 474; Dickerson v. Wason, 47 N. Y. 439; Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413; Clafin v. Wilson, 51 Iowa 15; Commercial Bank v. Armstrong, 148 U. S. 50; Evansville Bank v. German-Am. Bank, 155 U. S. 556; Josiah Morris & Co. v. Ala. Carbon Co., 139 Ala. 620.

25 First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 216, citing Mechanics' Bank v. Valley Packing Co., 70 Mo. 643; Northwestern Nat. Bank v. Bank of Commerce, 107 Mo. 402; Branch v. U. S. Nat. Bank, 50 Neb. 470, 474. A draft drawn in favor of the cashier of a bank for the purpose of enabling the institution to collect and apply the proceeds to the drawer's credit, is endorsed by that bank to another and enclosed in a letter thereto stating that the draft is for collection. The second bank takes the draft, not as a purchaser, but as a collector for the other bank. Josiah Morris & Co. v. Ala. Carbon Co., 139 Ala. 620. A drew upon B a draft which was payable to the order of C, who endorsed it, "Pay to D or order for collection for account of C." B received the draft, erased the endorsement and procured the discount of it at the plaintiff's bank, and sent the proceeds to A. As the draft was not paid, the plaintiff sued A, alleging that B, in procuring its discount acted as A's agent. It was held that this could not be shown by parol evidence; that the endorsement destroyed the negotiability of the bill and operated as a mere authority to D to receive the proceeds for A's use; that the erasure of the endorsement without A's consent destroyed the validity of the bill against him, of which the bank had knowledge at the time of discounting it. Mechanics' Bank v. Valley Packing Co., 70 Mo. 643.

26 Bank of Indian Territory v. First Nat. Bank, 83 S. W. (Indian Terr.) 537.

they exist or can be traced, are "for collection and credit," or "for collection and account," or "for collection and return," or "for collection and remittance."²⁷

It should be added that such ownership or control of the paper may not be consistent with a special agreement to the contrary, or with advances made to the endorser. When these conflicting agreements happen, the rights of the parties must obviously depend on the agreements themselves. Or, it may be that the endorser fails to recover the proceeds, not through any doubt concerning the nature and effect of his contract, but through his inability to prove his exclusive right to the proceeds.

14. Effect of Endorsement in Blank Followed by Qualified Endorsement.

Not infrequently a check endorsed by the depositor is qualified by the depository with some kind of a restrictive endorsement. By the weight of opinion the depositor of a check thus endorsed can claim, as against successive holders, to be the owner. Says the Supreme Court of Ohio in a recent decision:

²⁷ Armstrong v. National Bank, 11 Ky. L. Rep. 90, affd. 90 Ky. 431; Exchange Bank v. Sutton Bank, 78 Md. 577; In re Armstrong, 33 Fed. 405; Boyken v. Bank, 118 N. C. 566; Tyson v. Western Nat. Bank, 77 Md. 412; National Butchers' & Drov. Bank v. Hubbell, 117 N. Y. 384; National Com. Bank v. Miller, 77 Ala. 168; Sweeny v. Easter, 1 Wall. (U. S.) 166, 173; White v. National Bank, 102 U. S. 658, 661; Commercial Bank v. Armstrong, 148 U. S. 50, 56; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553; Freemen's Bank v. National Tube Works, 151 Mass. 413; First Nat. Bank v. First Nat. Bank, 76 Ind. 561; Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. 880. In First Nat. Bank v. Bank of Monroe, 33 Fed. 408, 411, Wallace, J., said: "When paper is delivered to a bank for collection [endorsed for collection and credit] the banker becomes the customer's agent to make collection with authority to pass the proceeds to the customer's account by a credit after they are collected; and he undertakes the duty of an agent for all the purposes of making the collection. He cannot terminate his responsibility as an agent until he has fully discharged it, and has substituted in its place his unqualified obligation as a debtor. Until the banker becomes a debtor, and his obligation as such is complete and irrevocable, he remains an agent merely; and until then he acquires no title to the proceeds of the paper beyond the banker's lien."

"When the endorsement is for collection, it is notice to the drawee that the bank presenting the check or bill for payment is not the owner, but only the agent of the owner, and that the money is to be remitted to the owner, back through the same channel through which the check or bill was received by the collecting bank."²⁸ Such an endorsement by the bank is usually in harmony with the truth and the legal effect of it should be sustained.²⁹

But this view does not prevail everywhere; and wherever it does not, the depositor is regarded as parting with his title and all subsequent parties are safe in acting accordingly. The Corn Exchange Bank case³⁰ illustrates both the importance of and difficulty in applying this principle. A depositor of a bank in L sent a check drawn thereon to C, who lived in I. C endorsed it in blank and deposited it with a banker in I, who, after endorsing it for collection and credit, sent it to the Corn Exchange Bank of New York City. After making a similar endorsement, it sent the check to the drawer bank for payment. The L bank charged it to the drawee and sent a draft drawn on another New York City bank in payment. By request of the L bank, in accordance with the wishes of the drawer and payee of the check, payment of the draft was stopped. The Corn Exchange Bank then brought an action thereon against the L bank and recovered, two of the six judges, who tried the appeal, dissenting.

What title had the Corn Exchange Bank to the draft? The

28 First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 213.

29 Levi v. National Bank, 5 Dill. (U. S.) 104; First Nat. Bank v. First Nat. Bank, 4 Dill. (U. S.) 290; Beal v. City of Somerville, 1 C. C. A. 598; Balbach v. Frelinghuyzen, 15 Fed. 675; National Gold Bank v. McDonald, 51 Cal. 64; Armstrong v. National Bank, 90 Ky. 431; Manuf. Nat. Bank v. Continental Bank, 148 Mass. 553; Freeholders of Co. of Middlesex v. State Bank, 32 N. J. Eq. 467; Hazlett v. Commercial Nat. Bank, 132 Pa. 118; Rapp v. National Security Bank, 136 Pa. 426; Armour Packing Co. v. Davis, 118 N. C. 548, citing many cases; National Com. Bank v. Miller, 77 Ala. 168; Josiah Morris & Co. v. Alabama Carbon Co., 139 Ala. 620, 764; Garrison v. Union Trust Co., 139 Mich. 392.

30 118 N. Y. 443. See also Castle v. Corn Ex. Bank, 148 N. Y. 122.

check, though endorsed in blank by the owner, had been restricted by its correspondent, so it had no right to credit the proceeds against the I bank for past advances, even were this permissible in New York. There was no evidence to show that the correspondent's limited endorsement had been set aside by any present or future advances. Was not the payee of the original check therefore the true owner of the draft? If, on the other hand, advances had been made to the banker on the check, notwithstanding his limited endorsement, then the Corn Exchange Bank would have acquired a real interest in the check and also in the draft given in payment.

15. Effect of Advancing.

The ownership of the depositor, notwithstanding his restrictive endorsement, is impaired or destroyed by advancing to him, for this action is inconsistent with the depositor's full retention of his title.³¹ An advance therefore transfers the title or creates a lien to the extent of the advance, otherwise it could not be made.

16. Effect of Crediting.

A credit may be given for a check, note or other paper deposited by a customer by special agreement,³² or by purchase³³ which passes the title to the bank. It may also become the owner by making a present advance thereon,³⁴ or by taking the

31 Midland Nat. Bank v. Roll, 60 Mo. App. 585, 588.

32 See Chap. VII. §8; German Nat. Bank v. Grinstead, 21 Ky. L. Rep. 674; Brooks v. Bigelow, 142 Mass. 6; Richardson v. Continental Nat. Bank, 36 C. C. A. 315. See Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530. The crediting of a check to the drawee without authority is invalid and it can be reclaimed. First Nat. Bank v. Payne, 85 Va. 890.

33 Taft v. Quinsigamond Nat. Bank, 172 Mass. 363.

34 Armstrong v. American Ex. Nat. Bank, 133 U. S. 433, 453, 454, and cases cited. Clark v. Merchants' Bank, 2 N. Y. 380, revg. 1 Sand. 425; Studebaker Bros. Manufg. Co. v. First Nat. Bank, 42 S. W. (Tex. Civ. App.) 573. A banker who receives endorsed bills for collection when due, which are credited to his account, may discount, sell or pledge them. Gneaux v. Wheeler, 6 Tex. 515.

same in payment of one already made.³⁵ In all these cases there is no question concerning the ownership.

On the other hand, a credit which is understood to be provisional and against which no money can be drawn until it is collected,³⁶ or only as a favor,³⁷ or for convenience,³⁸ does not transfer the check or other paper credited to the bank. But when the crediting creates the right to draw at once for the amount, two different theories prevail concerning the ownership of the paper credited; one, that the title thereto passes at once to the bank;³⁹ the other that the depositor still retains his

35 Ibid.

36 Richardson v. Continental Nat. Bank, 36 C. C. A. 315; Richardson v. Louisville Bkg. Co., 36 C. C. A., 307; Levi v. Nat. Bank, 5 Dill. (U. S.) 104; First Nat. Bank v. First Nat. Bank, 4 Dill. 290; National Butchers' & Drov. Bank v. Hubbell, 117 N. Y. 384; Armstrong v. National Bank, 90 Ky. 431, 437. See Richardson v. N. O. Coffee Co., 43 C. C. A. (U. S.) 583.

37 Arnold v. Clark, 1 Sand. (N. Y. Superior Ct.) 491; Balbach v. Frelinghuysen, 15 Fed. 675; Midland Nat. Bank v. Brightwell, 148 Mo. 358; Interstate Nat. Bank v. Ringo, 83 Pac. (Kan.) 119, 123.

38 Beal v. City of Somerville, 5 U. S. App. 14; City of Phila. v. Eckels, 98 Fed. 485.

39 Chap. VII. §88. Taft v. Quinsigamond Nat. Bank, 172 Mass. 363; First Nat. Bank v. Smith, 132 Mass. 227; Shawmut Nat. Bank v. Manson, 168 Mass. 425; Carr v. National Security Bank, 107 Mass. 45; Brooks v. Bigelow, 142 Mass. 6; Clark v. Merchants' Bank, 2 N. Y. 380; Cragie v. Hadley, 99 N. Y. 133; Riverside Bank v. Woodhaven Junction Land Co., 34 N. Y. App. Div. 359; Moore v. Riverside Bank, 25 N. Y. Misc. 720; Kirkham v. Bank, 165 N. Y. 132; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530, 537; People v. St. Nicholas Bank, 77 Hun (N. Y.) 159; Union Nat. Bank v. Citizens' Bank, 153 Ind. 44, 51, citing the Indiana cases; Aebi v. Bank of Evansville, 124 Wis. 73; Security Bank v. Northwestern Fuel Co., 58 Minn. 141; Morris v. First Nat. Bank, 201 Pa. 160; Armstrong v. National Bank, 90 Ky. 431; Ayres v. Farmers' & Merch. Bank, 79 Mo. 421; Flannery v. Coates, 80 Mo. 444; Midland Nat. Bank v. Roll, 60 Mo. App. 585; Hendley v. Globe Refinery Co., 106 Mo. App. 20; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 38 C. C. A. 108; First Nat. Bank v. Armstrong, 39 Fed. 231; Armstrong v. American Ex. Nat. Bank, 133 U. S. 433, 453; Ex parte Richdale, L. R. 19 Ch. Div. 409. See National Com. Bank v. Miller, 77 Ala. 168. "Upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, checks, or drafts, or other negotiable paper received and credited as money, the title of the money, drafts or other paper immediately becomes the property of the bank, which becomes debtor to the depositor for

ownership until he has drawn against the amount, or it has been applied to extinguish a past advance.⁴⁰

The former theory is very generally maintained,⁴¹ the latter theory rests on the most conclusive principles. For why should the ownership pass to the bank so long as it has given nothing therefor, contrary to one of the most fundamental principles of the law? A bank by such crediting does not owe the money until it is collected,⁴² unless it has agreed to pay in advance of collection. This is often done, not as a right, but as a favor. It is strictly a loan, and a bank would be slow indeed to oblige itself to make such loans on the presentation and crediting of any check that a depositor might bring to the bank. Consequently, it is not bound by these credits, and does not hesitate to strike them off when checks are not collected.

Furthermore, such a loan is indefinite both in amount and duration. No one will question the bank's right to discontinue the arrangement by its own action, which may happen when checks have been returned uncollected, or for other reasons. For, if it did not have this right of revocation, it would hardly dare to lend on such conditions.

The revocation would be effective to release the bank from all checks given afterward, but it has been held that it would be bound on those previously given.⁴³ It is true that the bank makes the agreement to honor such checks relying on the security; and if this proves to be delusive, is the bank under the slightest obligation to honor his checks? Is there any justice

the amount, unless a different understanding affirmatively appears." *Security Bank v. Northwestern Fuel Co.*, 58 Minn. 141, 144, citing *In re State Bank*, 56 Minn. 119.

40 *Tyson v. Western Nat. Bank*, 77 Md. 412; *Armour Packing Co. v. Davis*, 118 N. C. 548. "When a check, draft or promissory note is endorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the endorsement." *Tyson case*, 77 Md. 412.

41 Cases in note 39, see also Chap. VII. §8.

42 *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *Armstrong v. National Bank*, 90 Ky. 431.

43 *Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank*, 38 C. C. A. 108; *German Nat. Bank v. Grinstead*, 21 Ky. L. Rep. 674.

in holding it liable to an agreement so one-sided? The holders of such checks may indeed be interested in the bank's continued action, but having made no agreement with them, is under no obligation to them,⁴⁴ except in the states where the assignment rule prevails.

A final word on this topic. As the arrangement to honor checks is thus based on the security of other checks deposited, and is limited by the amount of them, consequently when the bank fails to collect them, it clearly follows that the depositor's right to draw against them is correspondingly diminished. All this is clearly understood or implied between banks and their customers in the beginning. With what justice then can a depositor, or third person to whom he has given his check, demand that it shall pay an overdraft, for this is precisely what they seek to do when the cash deposit or security for his checks is inadequate to pay them.

Of course, wherever the crediting of a check with the right to draw for the amount passes the title, the loss, if this subsequently happens by transmission through the mail or in other ways, must fall on the bank.⁴⁵

17. To Receive Paper When Insolvent is a Fraud.

It is a fraud for an insolvent depository to receive paper for collection, and no matter what may be the endorsement, the bank acquires no title.⁴⁶ But if a check endorsed in blank is

44 Carr v. National Security Bank, 107 Mass. 45. See Chap. XXIII.
§17.

45 Walton v. Riverside Bank, 29 N. Y. Misc. 304, affg. 28 Misc. 449.

46 Chap. VI. §6. Chicago Title & Trust Co. v. Household Guest Co., 88 Ill. App. 126; Importers & Traders' Nat. Bank v. Peters, 123 N. Y. 272; Richardson v. Olivier, 44 C. C. A. 468; First Nat. Bank v. Strauss, 66 Miss. 479; Higgins v. Hayden, 53 Neb. 61; Alstyne v. Crane, 4 T. & C. (N. Y.) 113; Rochester Printing Co. v. Loomis, 120 N. Y. 659, affg. 45 Hun 93; Spring Brook Chemical Co. v. Dunn, 39 N. Y. App. Div. 130; Cragie v. Smith, 14 Abb. N. C. (N. Y.) 409; Corn Ex. Nat. Bank v. Solicitors' Loan & Trust Co., 188 Pa. 330; Friberg v. Cox, 97 Tenn. 550; Parker v. Crawford, 3 Willson's Civ. Cas. (Tex.) §365, p. 435; Quin v. Earle, 95 Fed. 728; St. Louis & San Francisco R. v. Johnston, 133 U. S. 566. The mere crediting of the account of the remitting bank by a corres-

transferred to another bank and advances are made thereon in good faith, it can hold the check. The depositor in such a case must suffer that the great rule, whereby a bona fide holder of paper is protected in taking it, may be preserved.⁴⁷

18. Ownership of Intermediate Holder.

An intermediate holder cannot enlarge his right, or the right of a subsequent holder by his sole action; he can, however, restrict still more, if he pleases, the title, circulation and mode of collecting the paper.⁴⁸

19. Interpretation of Special Endorsement.

Intermediate holders very generally endorse the paper specially; among depositors the practice is not so general. These special endorsements may be divided into two classes: One which preserves the endorser's ownership unless some act is done like that of advancing, or some other agreement is made inconsistent therewith; the other class in which the title is transferred, either immediately, or at some period anterior to the collection and return of the proceeds.

The endorsements of the former class are in form "for collection," "for collection and remittance" and "for deposit," "for deposit to the credit of" the depositor and "for deposit to the account of" the depositor. While courts are not uniform in their interpretation of them, generally they have been effective to retain the endorser's interest,⁴⁹ unless advances to

pondent employed to make collections does not create in favor of the latter such an equity as can be successfully interposed as a defence to an action by the owner for the proceeds. *Branch v. U. S. Nat. Bank*, 50 Neb. 470, 475.

47 *Bank of Metropolis v. New Eng. Bank*, 1 How. (U. S.) 234.

48 *Armstrong v. National Bank*, 90 Ky. 431; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413; *Cody v. City Nat. Bank*, 55 Mich. 379. See *Hoffman v. Miller*, 9 Bos. (N. Y.) 334.

49 *United States Nat. Bank v. Geer*, 55 Neb. 462; *Armour Bros. Bkg. Co. v. Riley Co. Bank*, 30 Kan. 163; *National Com. Bank v. Miller*, 77 Ala. 168; *Ditch v. Western Nat. Bank*, 79 Md. 192, 205; *Tyson v. Western Nat. Bank*, 77 Md. 412; *Freeman v. Exchange Bank*, 87 Ga. 45; *Beal v. City of Somerville*, 1 C. C. A. (U. S.) 598; *In re Armstrong*, 33 Fed. 405;

him have been made thereon.⁵⁰ The statement perhaps should be repeated that the effect of these endorsements considered by themselves may be deflected by agreement, or by some counter act, an advance or the like, and in the vast field covered by these endorsements some additional element is often present.

The two forms of endorsement that have caused the widest disparity of opinion are those "for collection and credit" and "for collection on account of" the endorser. Some courts regard the words "for collection" as controlling, and when they do, the same effect is given to these endorsements as to the others mentioned; other courts regard the crediting words as controlling, and thus thinking declare that the endorser retains his ownership until the paper is collected and credited, and that after the close of the agency relation the endorser becomes a creditor to the collector.⁵¹

(a.) Several other considerations that are associated with the use of these endorsements must be kept in sight. They do not form the entire contract between the depositor and the bank. Between these parties their effectiveness must be determined by other elements of the contract.

(b.) Between other parties who have no knowledge of any other contract these endorsements furnish more completely the legal guide to their respective rights and liabilities.

(c.) All advances made on the strength of checks and other instruments deposited for collection are inconsistent with the retention of their absolute ownership by the depositor.

Balbach v. Frelinghuysen, 15 Fed. 675; Armour Packing Co. v. Davis, 118 N. C. 548; Boykin v. Bank, 118 N. C. 566; National Butchers' & Drov. Bank v. Hubbell, 117 N. Y. 384; National Bank v. Johnson, 6 N. Dak. 180, 184, citing many cases. See National Park Bank v. Levy, 17 R. I. 746.

50 Security Bank v. Northwestern Fuel Co., 58 Minn. 141; Ditch v. Western Nat. Bank, 79 Md. 192. See United States Nat. Bank v. Geer, 53 Neb. 67.

51 National Com. Bank v. Miller, 77 Ala. 168; Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 375; Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413; Franklin Co. Bank v. Beal, 49 Fed. 606; First Nat. Bank v. Armstrong, 39 Fed. 231; National Bank v. Johnson, 6 N. Dak. 180, citing many cases.

Whatever therefore may be the kind of endorsement thereon, their title or ownership to the extent at least needful to secure the bank for its advances passes to the institution.

20. Use of Parol and Other Evidence to Explain.

Endorsements between other than the original parties cannot be explained, enlarged or narrowed by parol evidence.⁵² On many occasions attempts have been made to prove that an endorsement "for collection," or "for deposit" was absolute, but these attempts have generally failed.⁵³

Between the immediate parties a different rule has been applied, especially to an endorsement in blank. "If," says the Supreme Court of Nebraska, "the law conclusively presumed the liability created by an endorsement in blank of commercial paper, then, of course, the actual terms of the contract would not be a proper subject of inquiry, and neither party would be permitted to show by parol the true agreement. But the presumption of liability arising from such an endorsement is *prima facie* merely, and not conclusive; hence, as against all except bona fide holders for value, the true terms of the contract may be shown by evidence resting in parol."⁵⁴

52 See Chap. XX. §14e.

53 Ibid; Leary v. Blanchard, 48 Me. 269; Freeman's National Bank v. National Tube Works Co., 151 Mass. 413; Third National Bank v. Clark, 23 Minn. 263; Rock Co. Nat. Bank v. Hollister, 21 Minn. 385; U. S. Nat. Bank v. Geer, 55 Neb. 462; Holmes v. First Nat. Bank, 38 Neb. 326; Armour Bros. Bkg. Co. v. Riley Co. Bank, 30 Kan. 163; Ditch v. Western Nat. Bank, 79 Md. 192; Lawrence v. Stonington Bank, 6 Conn. 521; Armstrong v. National Bank, 90 Ky. 431; Aurora Nat. Bank v. Dils, 18 Ind. App. 319; Sweeny v. Easter, 1 Wall. (U. S.) 166. See Borup v. Nininger, 5 Minn. 523.

54 United States Nat. Bank v. Geer, 55 Neb. 462; Davis v. Morgan, 64 N. C. 570. While an endorsement of a check is open to explanation between the parties, this rule cannot be applied to others. With respect to them an endorser must be held strictly to his obligation. Thus a company drew a check payable to the order of D on C bank, which was presented to the A bank endorsed by D in blank, but credited by his direction to him as agent. D was in truth the agent of the company, but kept an individual account in the bank. The check was sent to the drawee bank for payment, which was refused, for lack of funds and returned to the A bank. In the meantime the company had withdrawn all its funds from the bank.

Between them may also be shown a lack of consideration, for this does not contradict the contractual obligation.⁵⁵

21. Letters of Advice.

Letters of instruction often accompany paper for collection; sometimes these throw light on the endorsements, and when they do are generally admitted for that purpose.⁵⁶

22. Effect of Re-Transfer.

It is the general practice of banks to charge back checks if they are not collected; and some courts regard this right as inconsistent with the bank's ownership, even though advances have been made on them. The courts have been sorely puzzled by this question, yet the leading opinion clearly is that this practice does not in any way affect the title. From a purely technical point of view the existence of such a right is not in harmony with absolute ownership. The right to charge an uncollected check back ordinarily rests on the universal well-known usage which cannot be questioned except in those rare cases wherein a check is actually and with positive intention received by a bank as the owner.⁵⁷

Let us look at the practice and rights of the parties as they understand them without any thought of their legality. First, the banks expect in all cases (with rare exceptions) to charge

The check having been charged to D's account, on his endorsement, he sought to explain it, that he acted for the company, and thereby throw the loss on the bank. The court declared that the endorsement was "absolute in form" and that D did not "assume as agent any obligation for his principal." The fact that he directed the proceeds to be placed to the credit of the company did not affect the matter. *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319.

55 *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319, 328.

56 *Hoffman v. Miller*, 9 Bos. (N. Y.) 334; *Armstrong v. National Bank*, 90 Ky. 431, 435; *Josiah Morris Co. v. Alabama Carbon Co.* 139 Ala. 620. See Chap. XVIII, §1.

57 See §16; *Riverside Bank v. Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359; *Morris v. First Nat. Bank*, 201 Pa. 160; *Union Safe Deposit Bank v. Strauch*, 20 Pa. Super. Ct. 196; *Rapp v. National Security Bank*, 136 Pa. 426. See *Bank v. Cummings*, 89 Tenn. 609, 620, and *In re State Bank*, 56 Minn. 119, 125.

the checks back if they are not paid, and depositors expect that this will be done, no matter how they are endorsed. Second, is such action legal? Unquestionably. How shall the law regard this practice? Some courts say that the banks are not to be regarded as the unqualified owners,⁵⁸ others say that this right to return checks if they are not paid does not affect their ownership. The latter answer is more often given.⁵⁹

23. True Test of Ownership.

The true test of ownership is control. Whoever possesses this authority, or to the extent that he is the possessor, is also the owner.⁶⁰

58 It was agreed between a bank and depositor that his checks should be credited to his account and if not paid on presentation charged back. The condition was declared to be for the benefit of the bank, which was vested with the title subject to the condition. If therefore the condition never becomes operative, the bank has no title to divest. *Brusegaard v. Ueland*, 72 Minn. 283.

59 *Dymock v. Midland Nat. Bank*, 67 Mo. App. 97; *Ayres v. Farmers' & Merch. Bank*, 79 Mo. 421; *Bullene v. Coates*, 79 Mo. 426; *Midland Nat. Bank v. Roll*, 60 Mo. App. 585; *Hendley v. Globe Refinery Co.*, 106 Mo. App. 20.

60 In *First Nat. Bank v. Armstrong*, 39 Fed. 231, 233, a draft was endorsed "for collection," yet the receiving bank credited it by agreement as cash, the sending bank having the right to draw immediately for the amount. The receiving bank was declared to be the owner, which was not affected by the further agreement that it could be charged back if it was not paid. "That was nothing more than would have resulted without any such agreement."

CHAPTER XVIII.

MODE OF MAKING COLLECTIONS.

<ol style="list-style-type: none">1. How collections must be made. Instructions.2. Conflicting interest of collector.3. Collections of drafts.<ol style="list-style-type: none">a. Sight draft.b. Surrender of security.c. Responsibility of bank discounting a draft with bill of lading attached.d. Drawee cannot recall payment made by mistake.4. Notification of endorsers. Responsibility for notary.5. Presentation through the mail to the drawee.6. Remittance by mail cannot be recalled.7. Loss by mail.8. Circuitry of presentation.9. What can be received in payment.<ol style="list-style-type: none">a. Checks, drafts, depreciated money.b. When other paper may be received.c. When such paper must be presented.d. What collector must do if not paid.e. A different rule applies between collector and debt-	<ol style="list-style-type: none">or who gives the second paper.f. Recovery from drawee as collector after its failure.10. Money paid by debtor is a trust fund until completion of collection by payment of second paper.11. Unusual payment to avoid loss.12. Recovery of collection by bank paid by mistake.13. Recovery of collection by depositor from possessory bank.14. Collections sent to third person by depositor's order.15. Drawee bank receiving check for collection should promptly pay or decline to pay.16. Release of debtor on payment to collector.17. Extension of payments; or made in advance.18. Recovery by endorser when paying without knowledge of collector's negligence.19. Collections for non-depositor.20. Action is for negligence. Causes.21. Defences.22. Suit for negligence after assignment of debt.23. Damages.24. Liability of non-banker.
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1. How Collections Must be Made. Instructions.

So far as instructions go, these must be the guide.¹ They bind all to whom they are addressed, or who know of them, and are concerned in the business.² In matters not covered by them law and usage must be followed.³ Collectors are not responsible for a mistake in a doubtful matter of law,⁴ and when no instructions are received they must exercise their best judgment.⁵

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¹ Bedell v. Harbine Bank, 62 Neb. 339; Omaha Nat. Bank v. Kiper, 60 Neb. 33; First Nat. Bank v. First Nat. Bank, 55 Neb. 303; First Nat. Bank v. Bank of Whittier, 77 N. E. (Ill.) 563; Crow v. Mech. & Traders' Bank, 12 La. Ann. 692; Capital State Bank v. Lane, 52 Miss. 677; Finch v. Karste, 97 Mich. 20; Garrison v. Union Trust Co., 139 Mich. 392; Wallace v. Stone, 107 Mich. 190; Huff v. Hatch, 2 Dis. (Ohio) 63; Central Ga. Bank v. Cleveland Nat. Bank, 59 Ga. 667; Butts v. Phelps, 90 Mo. 670; First Nat. Bank v. Mungesheimer, 26 S. W. (Tex. Civ. App.) 428; People v. Bank of Dansville, 39 Hun (N. Y.) 187; Thompson v. State Bank, 3 Hill (S. C.) 77; Farmers' Bank v. Fudge, 109 Mo. App. 186; Bank of Mobile v. Huggins, 3 Ala. 206; Josiah Morris & Co. v. Ala. Carbon Co., 139 Ala. 620; Hutchinson v. National Bank, 41 So. (Ala.) 143; Lord v. Hingham Nat. Bank, 186 Mass. 161. When a draft with a bill of lading attached is sent to a bank with instructions to notify the shipper, if the draft is unpaid, it cannot sell the goods to a third party without giving the notice, and if it does, is guilty of conversion. Gregg v. Bank of Columbia, 72 S. C. 458. A bank held notes endorsed by the payee who took a chattel mortgage to secure them. At maturity the bank sent the notes to him for collection, with the direction if they were not paid, to protest and return them. Instead of doing so he foreclosed the mortgage in order to procure funds to reimburse the holder. In so doing he did not act as the holder's agent. Sanborn v. First Nat. Bank, 115 Mo. App. 50. A state bank sent to a savings bank a draft for collection, with a general endorsement. That bank endorsed it, "pay to any state or national bank," and sent it to a private bank for collection and credit with instructions to return it at once if not paid. The latter bank delayed collection, following its custom, awaiting the arrival of merchandise against which it was drawn. On its arrival the amount of the draft was credited to the savings bank, with which there was a mutual account. Before the savings bank had been notified of the collection it had failed. Nevertheless the private bank held its lien on the proceeds against the state bank. Nor was this defeated by the non-return of the draft in accordance with its instructions. Garrison v. Union Trust Co., 139 Mich. 392. By agreement of all parties A drew his draft on B, a private banker, for the amount of C's indebtedness, who was to furnish the money to B to meet the draft. The draft was mailed by A to B, with directions to remit the proceeds to a named bank for A's credit.

Though banks have mutual accounts and credits, these do not control the instructions of depositors. Therefore if a depositor deposits a draft for collection, which is not to be credited to him until collected, and the bank endorses it "for collection account of Bank of A," the endorsement is notice to the sub-agent of the depositor's ownership of the draft.⁶ But instructions accompanying a sight draft sent to a bank for collection, "Papers to be delivered only on payment of the draft," are not violated by their delivery for a short period to the drawee at

The money was sent by C to B, who died before remitting the amount to the bank for A. A was permitted to recover it, however, of B's estate. *First Nat. Bank v. Hummel*, 14 Colo. 259.

When the holder of a note delivers it to a bank with a direction to collect and appropriate the proceeds in a particular manner, for example, to pay another note, it may elect to realize the proceeds either by discounting the note or by collecting it at maturity. *Drown v. Pawtucket Bank*, 15 Pick. (Mass.) 88. A bank received a negotiable note with instructions to remit the proceeds when collected to the payee. The bank soon afterward, without the payee's knowledge, paid to a third party a partnership note of which the payee above described was a member. The other note was afterward used by the owner and the bank was notified of the sale. The bank, nevertheless, collected the money but could not set off the sum due on the other note against the collection. *Commercial State Bank v. Rowland*, 31 Neb. 483. The plaintiff employed an agent to take a note to a bank for collection. It was competent for him to show what instructions he gave his agent at the time for the purpose of showing the special agency. *Nininger v. Knox*, 8 Minn. 140.

2 If the signature of the payee-endorser of a draft is unknown to a collecting bank, and also in its opinion to the drawee, it can send the draft to the drawer for identification. *Davis v. First Nat. Bank*, 118 Cal. 600.

3 *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561; *Freeman's Nat. Bank v. National Tube Works Co.*, 151 Mass. 413; *Dorchester & Milton Bank v. New England Bank*, 1 Cush. (Mass.) 177; *National Bank v. Johnson*, 6 N. Dak. 180; *Kershaw v. Ladd*, 34 Or. 375; *Hallam v. Tillinghast*, 19 Wash. 20; *Davis v. First Nat. Bank*, 118 Cal. 600. *Farmers' Bank v. Newland*, 97 Ky. 464; *Allen v. Merchants' Bank*, 15 Wend. (N. Y.) 482; *Savings Bank v. National Bank*, 98 Tenn. 337; *Adams v. Otterback*, 15 How. (U. S.) 539, see brief, 542.

4 *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13; *Morris v. Union Nat. Bank*, 13 S. Dak. 329. See §18.

5 *Bank v. Monongahela Nat. Bank*, 126 Fed. 436. See *Sahlien v. Bank*, 90 Tenn. 221, 229.

6 *Stevenson v. Taylor*, 113 N. C. 485.

his request for examination. "Such a temporary and qualified possession is not delivery."⁷

In collecting commercial paper the collector must exercise reasonable skill and diligence in presenting it at the time and place, and in the manner required by law.⁸ When it is not paid demand, protest and notice, and all other steps needful to hold the parties must be taken; for, if these things are not done, the collector is liable to the owner for the loss he sustains.⁹

The usual and popular meaning of the protest is a demand of payment in proper form and at the proper time, and in the event of non-payment due and reasonable notice to the endorsers by the bank, or any of its clerks, servants or other suitable persons.¹⁰ Such a protest will suffice to preserve the rights of antecedent parties to inland bills, checks and promissory notes. But the holder must exercise the same degree of diligence in giving notice of dishonor as in cases of needful formal protest.¹¹ A formal protest therefore is limited strictly to foreign bills of exchange.¹²

A bank that receives an endorsed note for collection must, if

7 People's Nat. Bank v. Freeman's Nat. Bank, 169 Mass. 129, 133, citing many cases.

8 Fabens v. Mercantile Bank, 23 Pick. 330; Mechanics' Bank v. Merchants' Bank, 6 Met. (Mass.) 13; First Nat. Bank v. First Nat. Bank, 116 Ala. 520; Commercial Bank v. Hamer, 7 How. (Miss.) 448, 451; Capitol State Bank v. Lane, 52 Miss. 677, 679; Taylor v. Sip, 30 N. J. Law 284; Sahlien v. Bank, 90 Tenn. 221; Merchants' & Manuf. Nat. Bank v. Stafford Nat. Bank, 44 Conn. 564; Steele v. Russell, 5 Neb. 211; Omaha Nat. Bank v. Kiper, 60 Neb. 33; Manhattan Life Ins. Co. v. First Nat. Bank, 20 Colo. App. 529.

9 Bank of New Hanover v. Kenan, 76 N. C. 340; West Branch Bank v. Fulmer, 3 Pa. 399; Ivory v. Bank, 36 Mo. 475; National Revere Bank v. National Bank, 172 N. Y. 102; Bank of Mobile v. Huggins, 3 Ala. 206; Buell v. Chapin, 99 Mass. 594.

10 Ayrault v. Pacific Bank, 47 N. Y. 570, 574.

11 Wood River Bank v. First Nat. Bank, 36 Neb. 744, 746; Hughes v. Kellogg, 3 Neb. 194; Bank of Mobile v. Huggins, 3 Ala. 206, 212. "Other duties may arise out of local laws, as if damages are given upon the protest of a bill or note; or, if a protest is essential to fix the liability of any party to it." Ibid.

12 First Nat. Bank v. German Bank, 107 Iowa 543.

not paid, take proper steps to fix the liability of the endorser.¹³ And if it is received from another bank, endorsed by its cashier, the collecting bank must, after presenting it for payment and failing to obtain the money, give notice of this to the sending bank.¹⁴ But the collecting bank is not required to notify other parties,¹⁵ unless by agreement.¹⁶ Of course, if one is made, it must be fulfilled.

In demanding payment of a note payable at a bank greater strictness must be observed than in demanding payment of an outside person. For, in the latter case the demand may be made at any time during the last day of payment; in the former case the demand must be made at the close of the bank day, for the maker has until that time to deposit money to pay his obligation.¹⁷ Indeed, presentment may be made after banking hours if a proper officer can be found to whom it may be presented.¹⁸

On the other hand the holder of a note thus made payable at a bank is not obliged to deposit money there for payment;

13 West v. St. Paul Nat. Bank, 54 Minn. 466.

14 Phipps v. Millbury Bank, 8 Met. (Mass.) 79; Colt v. Noble, 5 Mass. 167; Eagle Bank v. Chapin, 3 Pick. (Mass.) 180; Mead v. Engs, 5 Cow. (N. Y.) 303; Howard v. Ives, 1 Hill (N. Y.) 263; Bank v. Davis, 2 Hill 451; State Bank v. Bank, 17 Abb. Pr. (N. Y.) 364, reviewing many cases; McCullock v. Commercial Bank, 16 La. 566; Cardwell v. Allan, 33 Gratt. (Va.) 160; Codrington v. Adams, Fed. Cas. No. 2,937; Haynes v. Birks, 3 Bos. & Pul. (Eng.) 599; Firth v. Thrush, 8 B. & C. (Eng.) 387.

15 Ibid.

16 Bank v. Smedes, 3 Cow. (N. Y.) 662, affg. 20 Johns. 372. An agent is not required to notify endorsers unless specially directed or required by local custom. Bank of Mobile v. Huggins, 3 Ala. 206. A bank that has discounted a note for a dealer is not liable for failing to charge a prior endorser after the dishonor of the note. Lake v. Artisans' Bank, 17 Abb. Pr. (N. Y.) 232.

17 Church v. Clark, 21 Pick (Mass.) 310; Harrison v. Crowder, 6 Sm. & M. (Miss.) 464; Planters' Bank v. Markham, 5 How. (Miss.) 397.

18 Newark India Rubber Mfg. Co. v. Bishop, 3 E. D. Smith (N. Y.) 48; Garnett v. Woodcock, 1 Stark. (Eng.) 475.

Contra.—"As the general usage of banks is, to limit their business transactions to certain hours, a presentment, or demand, out of banking hours, is not sufficient." McKinney, J., in Swan v. Hodges, 3 Head (Tenn.) 251, 253.

and if the presentation be at the close of business hours this will suffice.¹⁹

Lastly, no presentment is required of a note remitted for collection to the same bank at which it is payable.²⁰

To these rules there may be added another, that a bank has no duty to perform in collecting notes and other securities which are entrusted to it for special deposit or safe-keeping. Constructively, they are still in their owners' possession with respect to their collection.²¹

2. Conflicting Interest of Collector.

The duty of a collecting bank having a claim of its own against the same debtor is not clearly settled. Some courts hold that it is the bank's duty to give precedence to the claim received;²² other courts maintain the opposite opinion.²³ In Kansas the rule is announced that a collector to whom a claim is sent for collection may collect its own claim before giving any light to the too confiding party of the situation. In delivering the opinion of the court Justice Allen remarked that this "may perhaps be inconsistent with good morals"²⁴—an opinion with which every one doubtless will agree. We rejoice that other

19 Harrison v. Crowder, 6 Sm. & M. (Miss.) 464.

20 Whiting v. City Bank, 77 N. Y. 363, 365; Folger v. Chase, 18 Pick. (Mass.) 63; Apperson v. Union Bank, 4 Cold. (Tenn.) 445; Huffaker v. National Bank, 13 Bush (Ky.) 644, 649; Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641. See 1 Dan. on Neg. Inst. §656 for more cases.

21 Bohl v. Carson, 11 C. C. A. (U. S.) 16; N. O. Canal & Banking Co. v. Escouffie, 2 La. Ann. 830. A collecting bank has no implied authority to sell paper deposited for collection. Fuller v. Bennett, 55 Mich. 357; People's & Drovers' Bank v. Craig, 63 Ohio St. 374.

22 Finch v. Karste, 97 Mich. 20; Dern v. Kellogg, 54 Neb. 560; Bank v. Kenan, 76 N. C. 340; Commercial Bank v. Red River Valley Nat. Bank, 8 N. Dak. 382.

23 Freeman v. Citizens' Nat. Bank, 78 Iowa 150; First Nat. Bank v. Naill, 52 Kan. 211; U. S. Nat. Bank v. Westervelt, 55 Neb. 424.

24 First Nat. Bank v. Naill, 52 Kan. 211, 216. In a later case the same court held that a bank which neglects to notify the remitting bank of refusal of payment, but takes action to secure itself and other creditors, is liable for abusing its trust. Sprague v. Farmers' Nat. Bank, 63 Kan. 12.

courts do not feel constrained to maintain the inconsistency and have adopted a different rule.²⁵

3. Collections of Drafts.

(a.) A bank that receives a sight draft for collection should present it the same day it is received, or the next day, to the drawee who lives in the same city for acceptance, in order to fix the date of maturity and presentation which, wherever days of grace still prevail, is the last day of the period.²⁶

(b.) Bills of lading that accompany drafts drawn on time must be surrendered after their acceptance, and retained with bills drawn on sight, until they are paid.²⁷ But if a bill of lading accompanying a time draft is to the order of the consignor, and is endorsed by him to the cashier of a bank to which it is to be transmitted for collection, the bill must be held by the

25 See especially *Bank v. Kenan*, 76 N. C. 340; *Mechem on Agency*, §455.

26 *Citizens' Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69 and cases cited; *First Nat. Bank v. Miller*, 37 Neb. 500; *Dyas v. Hanson*, 14 Mo. App. 363; *Rosenblatt v. Haberman*, 8 Mo. App. 486; *St. John v. Homans*, 8 Mo. 382, 385; 1 *Dan. on Neg. Inst.* §§327, 454, 467, 476. An agreement by a bank to accept a draft for a specified sum does not include in addition exchange. *State Bank v. Citizens' Nat. Bank*, 114 Mo. App. 663; *Lindley v. First Nat. Bank*, 76 Iowa 629. There cannot be a partial acceptance. *Ibid.*

27 *W. & A. McArthur Co. v. Old Second Nat. Bank*, 122 Mich. 223; *Lanfear v. Blossman*, 1 La. Ann. 148; *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99; *Marine Bank v. Wright*, 48 N. Y. 1; *Oxford Lake Line v. First Nat. Bank*, 40 Fla. 349; *Bank v. Cummings*, 89 Tenn. 609; *Security Bank v. Luttgen*, 29 Minn. 363; *Dows v. National Ex. Bank*, 91 U. S. 618; *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92; *Woolen v. N. Y. & Erie Bank*, 12 Blatchf. (U. S.) 359; *St. Paul Roller Mill Co. v. Despatch Co.*, 27 Fed. 434; *Commercial Bank v. Chicago & St. Paul R.*, 160 Ill. 401. A sold a car load of grain to B, shipping it by railroad and drawing on the consignee B for the price, and making payment a prerequisite to the surrendering of bill of lading and delivery of the grain. The bill was given to a bank to collect, which sent the draft and bill to B, who surrendered the bill to the railroad but, after examining the grain, refused to accept it, and returned the draft to A. The railroad requested both A and B to direct the disposition of the grain; both refused. The bank was liable for the amount of the draft less the freight charge. *Gulf R. v. North Texas Grain Co.*, 74 S. W. (Tex. Civ. App.) 567.

collecting bank until payment of the draft.²⁸ In all cases instructions must be followed.²⁹

(c.) A bank that discounts or purchases a draft to which a bill of lading is attached, that is duly paid by the consignee, is not responsible to him should he fail to secure the property represented by the bill.³⁰ The importance of this principle no one will question. Consignors constantly obtain bills of lading from a carrier, draw on their consignees for the grain or other property thus represented, present the draft to a bank which is promptly purchased; and the proceeds are given or credited to the vendors of the property. While the title thereto passes to the bank, and thus secures the loan, the bank, under ordinary conditions, does not exercise any control over the property and therefore is not responsible for its delivery.³¹

(d.) Finally, the drawee is concluded by his conduct in paying and cannot avoid his act by showing that he was mistaken in supposing that he had enough money in his possession for that purpose.³²

28 Dows v. National Ex. Bank, 91 U. S. 618. See Hieskell v. Farmers' & Mech. Nat. Bank, 89 Pa. 155, and Stollenwerck v. Thacher, 115 Mass. 224. A bank is not liable for the quality of the merchandise described in the bill of lading. Commerce Milling & Grain Co. v. Morris, 27 Tex. Civ. App. 553; Tolerton v. Anglo-Californian Bank, 112 Iowa 706, citing many cases.

29 Flood v. First Nat. Bank, 69 S. W. (Ky.) 750; Stollenwerck v. Thacher, 115 Mass. 224.

30 Hall v. Keller, 64 Kan. 211. See Chap. XXVIII. §9.

31 Blaisdell, Jr., Co. v. Citizens' Nat. Bank, 96 Tex. 626; Gregory v. Sturgis Nat. Bank, 71 S. W. (Tex. Civ. App.) 66; but see Landa v. Lattin, 19 Tex. Civ. App. 246; Tolerton v. Anglo-California Bank, 112 Iowa 706; Hoffman v. Bank, 12 Wall. (U. S.) 181; Goetz v. Bank, 119 U. S. 551; Thiedemann v. Goldschmidt, 1 De Gex, F. & J. (Eng.) 4. A banker who advances to an importer the purchase money for goods on drafts under a commercial letter of credit which requires that the goods shall be shipped to this country with bills of lading to the banker becomes the owner of the goods. Moors v. Bird, 190 Mass. 400. See Chap. VII. §10.

Contra.—Searles v. Smith Grain Co., 80 Miss. 688, see also Exchange Nat. Bank v. Russell, 32 So. (Miss.) 314; Finch v. Gregg, 126 N. C. 176; Columbian Nat. Bank v. White, 65 Mo. App. 677.

32 Bank of Indian Territory v. First Nat. Bank, 83 S. W. (Indian

4. Notification of Endorsers. Responsibility for Notary.

To give notice of the dishonor of a bill, check or other negotiable instrument is by the law merchant no part of a notary's official duty;³³ when, therefore, notices are given by him he acts for the holder.³⁴ But it is customary for him in protesting a bill to give notice of dishonor.³⁵ And in many states he is required by statute to give notice.³⁶

In discharging his official duty, by one rule, he is an agent of the bank that employs him, which, consequently, is liable for his negligence or misconduct.³⁷ This rule, however, may yield to contract or custom.³⁸ By the other and far more general rule he is an independent public officer who is responsible directly for his acts to the holder or owner of the paper committed to his charge.³⁹ Wherever this rule prevails, the bank that selected him is not responsible for his negligence unless it too

Terr.) 537; Hoffman v. Bank, 12 Wall. (U. S.) 181; Goetz v. Bank, 119 U. S. 551.

33 Swayze v. Britton, 17 Kan. 625; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215; First Nat. Bank v. German Bank, 107 Iowa 543, 545; 1 Daniel on Neg. Inst. §960; Bolles on Bank Collections, §§99, 100, p. 129.

34 Ibid; Bank of Lindsborg v. Ober, 31 Kan. 599.

35 First Nat. Bank v. German Bank, 107 Iowa 543, 545; Proffatt on Notaries Public, §§142, 143.

36 Ibid; Wheeler v. State, 9 Heisk. (Tenn.) 393.

37 Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215; Howard v. Ives, 1 Hill (N. Y.) 263; Mead v. Engs, 5 Cow. (N. Y.) 303; Davey v. Jones, 42 N. J. Law 28; Thompson v. State Bank, 3 Hill (S. C.) 77; Bartlett v. Isbell, 31 Conn. 296.

38 Ayrault v. Pacific Bank, 47 N. Y. 570, 574. "The practice or usage of banks adopted for their own convenience in transacting their business cannot vary the contract between them and their dealers." Ibid; Bank v. Flagg, 1 Hill (S. C.) 177, 181.

39 First Nat. Bank v. German Bank, 107 Iowa 543; Britton v. Nicolls, 104 U. S. 757, and explanation of this case in Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 284; May v. Jones, 88 Ga. 308, 311; Citizens' Bank v. Howell, 8 Md. 530; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Tiernan v. Commercial Bank, 7 Sm. & M. (Miss.) 648; Agricultural Bank v. Commercial Bank, 7 Sm. & M. (Miss.) 592; Baldwin v. State Bank, 1 La. Ann. 13; Hyde v. Planters' Bank, 17 La. 560; Bank v. Butler, 41 Ohio St. 519; Stacy v. Dane Co. Bank, 12 Wis. 629; Bellemire v. U. S. Bank, 4 Wh. (Pa.) 105; Wood River Bank v. First Nat. Bank, 36 Neb. 744; Mecham on Agency, §514.

was negligent in its selection,—employing one who was clearly unfit to perform the service;⁴⁰ or gave him improper instructions which he followed.⁴¹

Another distinction must be noticed. In some states, where the second rule has been established, a bank is nevertheless liable for the conduct of a notary who is one of the bank's officers or employes.⁴² In other states this distinction is regarded as unsound. In one of the latest cases the Supreme Court of Iowa, after declaring that a notary was a public officer, added that "as such officer, the bank may not control his acts, nor dictate in what manner he shall perform his duties. If guilty of malfeasance in the performance of an official act, he, and not the bank, is responsible. That this notary was an employe of the bank can make no difference."⁴³

A bank officer can protest paper belonging to it. This rule has existed ever since the removal of his disqualification from testifying concerning presentment, demand and notice.⁴⁴ While the notary's official relationship to the bank may not disqualify him from acting, his interest in the matter may unfavorably affect his action.⁴⁵ Thus a notary who is also a cashier may take

40 Ibid.

41 Huff v. Hatch, 2 Dis. (Ohio) 63; Mount v. First Nat. Bank, 37 Iowa 457, 460.

42 Wood River Bank v. First Nat. Bank, 36 Neb. 744; Gerhardt v. Boatman's Sav. Institution, 38 Mo. 60; Mount v. First Nat. Bank, 37 Iowa 457, 460.

43 First Nat. Bank v. German Bank, 107 Iowa 543; Keene Guar. Sav. Bank v. Lawrence, 32 Wash. 572, and cases cited. See also Chap. IX. §20, note 79.

44 Nelson v. First Nat. Bank, 69 Fed. 798, 801; Moreland v. Citizens' Sav. Bank, 97 Ky. 211; Dykman v. Northridge, 153 N. Y. 662, affg. 1 App. Div. 26.

Contra.—Herkimer Co. Bank v. Cox, 21 Wend. (N. Y.) 119; Bank v. Porter, 2 Watts. (Pa.) 141.

45 Bank v. Oberhaus, 125 Cal. 320; Horbach v. Tyrrell, 48 Neb. 514; Smith v. Clark, 100 Iowa 605; City Bank v. Radtke, 87 Iowa 363; Moreland v. Citizens' Sav. Bank, 97 Ky. 211; Florida Sav. Bank v. Rivers, 36 Fla. 575; Penn v. Garvin, 56 Ark. 511; Bexar Building Assn. v. Heady, 21 Tex. Civ. App. 154; Kothe v. Krag-Reynolds Co., 20 Ind. App. 293, citing many cases. See also Gibson v. Norway Sav. Bank, 69 Me. 579; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572.

the acknowledgment of a mortgage to the bank, but if he is also a stockholder and, consequently, interested in a pecuniary way in the matter, he is disqualified.⁴⁶ Some of the states, however, are removing this disqualification by statute.⁴⁷

In making presentment and in giving notice, when this is a part of his duty, proper skill and diligence must be exercised.⁴⁸ To this end he must make due inquiry concerning the residence of the persons of whom demand is to be made,⁴⁹ and to whom notice of non-payment is to be sent.⁵⁰ Furthermore, in presenting bills for acceptance or payment, this must be done by himself; he cannot serve by clerk or deputy.⁵¹ Whether, in a particular case, proper preliminary inquiry has been made and the notary, after receiving the information, has duly acted afterward, are facts ordinarily for the determination of the jury.

The liability of a bank for the notary's negligence in making presentment and protest, and in notifying endorsers, is not governed by uniform principles.

First. In those states in which a bank is liable for the conduct of the sub-agent it is also liable both for the official and unofficial acts of the notary employed, save in the state of New York,⁵² where the bank is not liable for his acts which are of an official character.⁵³

46 Ibid.

47 Kansas Stat. 1905, Ch. 311; N. Dak. Civil Code, §3593a.

48 Cohen v. Hunt, 2 Sm. & M. (Miss.) 227. A note was made payable at a bank, but the notary did not demand payment until after banking hours. Then he entered the back door and demanded payment of the teller, who refused payment because there were no funds belonging to the maker. The demand was sufficient to charge the endorser on protest and notice. Commercial Bank v. Hamer, How. (Miss.) 448.

49 Tate v. Sullivan, 30 Md. 464.

50 Sweet v. Woodin, 72 Mich. 393, 395.

51 Locke v. Huling, 24 Tex. 311.

52 Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 241. See Bolles on Bank Collections, §104, p. 133.

53 Ayrault v. Pacific Bank, 47 N. Y. 570; Titus v. Mechanics' Nat. Bank, 35 N. J. Law 588; Davey v. Jones, 42 N. J. Law 28; Simpson v. Waldby, 63 Mich. 439; Power v. First Nat. Bank, 6 Mont. 251; Scott v. Lifford, 9 East (Eng.) 347; Haynes v. Birks, 3 Bos. & Pull (Eng.) 599.

Second. In those states wherein a bank is not liable for the conduct of the sub-agent, the bank which actually made the collection is alone responsible for the notary's conduct.⁵⁴

Third. Wherever the notary is regarded as an independent officer, he alone is responsible for his conduct.⁵⁵

5. Presentation Through the Mail to the Drawee.

Once it was the universal custom to send checks and other instruments directly by mail to the drawee bank for payment; and this practice still prevails in some states.⁵⁶ On the other hand, it has been condemned by many of them,⁵⁷ unless there

54 *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *East Haddam Bank v. Scovil*, 12 Conn. 303; *Guelich v. National State Bank*, 56 Iowa 434; *Daly v. Butchers' & Drov. Bank*, 56 Mo. 94; *Citizens' Bank v. Howell*, 8 Md. 530; *Bank v. Ober*, 31 Kan. 599, 607; *Stacy v. Dane Co. Bank*, 12 Wis. 629; *Bank v. First Nat. Bank*, 8 Bax. (Tenn.) 101; *Bellemire v. Bank*, 4 Whart. (Pa.) 105; *American Express Co. v. Haire*, 21 Ind. 4; *Bank of Mobile v. Huggins*, 3 Ala. 206; *Montillet v. Bank*. 1 Martin (La. N. S.) 365; *Canonge v. La. State Bank*, 3 Martin (La. N. S.) 344; *Pritchard v. La. State Bank*, 2 La. 415; *Miranda v. City Bank*, 6 La. 740; *Oakey v. Bank*, 17 La. 386.

Contra and later.—*Hyde v. Planters' Bank*, 17 La. 560; *Frazier v. N. O. Gas Light & Bkg. Co.*, 2 Rob. (La.) 294; *Baldwin v. State Bank*, 1 La. Ann. 13.

55 *Britton v. Nicolls*, 104 U. S. 757; *Hyde v. Planters' Bank*, 17 La. 560; *Frazier v. N. O. Gas Light & Bkg. Co.*, 2 Rob. (La.) 294; *Baldwin v. State Bank*, 1 La. Ann. 13; *Agricultural Bank v. Commercial Bank*, 7 Sm. & M. (Miss.) 592; *Bowling v. Arthur*, 34 Miss. 41; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744. See *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60.

56 *Indig v. National City Bank*, 80 N. Y. 100; *Briggs v. Central Nat. Bank*, 89 N. Y. 182; *People v. Merchants' & Mech. Bank*, 78 N. Y. 269; *Corn Ex. Bank v. Lancaster Nat. Bank*, 118 N. Y. 443; *National Revere Bank v. National Bank*, 172 N. Y. 102; *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485; *Hutchinson v. Manhattan Co.*, 150 N. Y. 250, revg. 9 N. Y. Misc. 343; *McIntosh v. Tyler*, 47 Hun (N. Y.) 99; *Kershaw v. Ladd*, 34 Or. 375; *Farmers' Bank v. Newland*, 97 Ky. 464; *Jefferson Co. Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337; *Farwell v. Curtis*, 7 Biss. (U. S.) 160, 162. See *First Nat. Bank v. Third Nat. Bank*, 4 Dill. (U. S.) 290.

57 This is clearly the more generally favored rule. *Lowenstein v. Bresler*, 109 Ala. 326; *German Nat. Bank v. Burns*, 12 Colo. 539; *Drovers' Nat. Bank v. Anglo-Am. Packing Co.*, 117 Ill. 100; *First Nat. Bank v. Bank of Whittier*, 77 N. E. (Ill.) 563; *Anderson v. Rodgers*, 53 Kan. 542;

is no other bank in the place; or instructions or other circumstances attending the deposit justified the bank in sending to the drawee for payment.⁵⁸ Wherever the more general rule prevails and is violated and the drawee bank fails having in its possession a sufficient fund belonging to the drawer to pay the check, he is discharged.⁵⁹

When paper is thus sent to the drawee bank to collect, by one view it acts as collector,⁶⁰ by another as payor,⁶¹ by the third and better view as a double agent both of the sender to collect and of the payee to discharge the obligation.⁶² It is the duty of the bank therefore to make the usual demand for payment, and, if it is not paid, to take legal steps to charge the endorser, should the paper be endorsed.⁶³

Payment, therefore, by the debtor to the agent, either in

Bank v. Kenan, 76 N. C. 340; Minneapolis Sash Co. v. Metropolitan Bank, 76 Minn. 136; Whitney v. Esson, 99 Mass. 308; Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105; Dern v. Kellogg, 54 Neb. 560; Merchants' Nat. Bank v. Goodman, 109 Pa. 422; Wagner v. Crook, 167 Pa. 259; First Nat. Bank v. City Nat. Bank, 12 Tex. Civ. App. 318; First Nat. Bank v. Citizens' Sav. Bank, 123 Mich. 336; Carson v. Fincher, 129 Mich. 687; American Ex. Nat. Bank v. Metropolitan Nat. Bank, 71 Mo. App. 451, 457. (See contra, Ripley Nat. Bank v. Latimer, 64 Mo. App. 321.) National Bank v. Johnson, 6 N. Dak. 180; Commercial Bank v. Red River Valley Nat. Bank, 8 N. Dak. 382; O'Leary v. Abeles, 68 Ark. 259, 262; (see Auten v. Manistee Nat. Bank, 67 Ark. 243); Givan v. Bank, 52 S. W. (Tenn. Ch. App.) 923; Farley Nat. Bank v. Pollock, 39 So. (Ala.) 612, and cases cited; Jefferson Co. Sav. Bank v. Hendrix, 39 So. (Ala.) 295; First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. (U. S.) 183.

58 Wilson v. Carlinville Nat. Bank, 187 Ill. 222; First Nat. Bank v. Citizens' Sav. Bank, 123 Mich. 336.

Contra.—Minneapolis Sash Co. v. Metropolitan Bank, 76 Minn. 136.

59 Wagner v. Crook, 167 Pa. 259.

60 Bank of New Hanover v. Kenan, 76 N. C. 340, 345; Exchange Bank v. Sutton Bank, 78 Md. 577, 587.

61 City Nat. Bank v. Burns, 68 Ala. 267; Gettysburg Nat. Bank v. Kuhns, 62 Pa. 88; Indig v. City Nat. Bank, 80 N. Y. 100; People v. Merchants' & Mech. Bank, 78 N. Y. 269.

62 Indig v. National City Bank, 80 N. Y. 100; Exchange Bank v. Sutton Bank, 78 Md. 577, 587; Lowenstein v. Bresler, 109 Ala. 326; National Revere Bank v. National Bank, 172 N. Y. 102; Anheuser-Busch Brewing Assn. v. Clayton, 6 C. C. A. 108; Farwell v. Curtis, 7 Biss. (U. S.) 160.

63 Ibid; Bank of New Hanover v. Kenan, 76 N. C. 340.

money or by crediting his account, is a discharge of his debt as between him and his creditor. And should the agent fail to remit, or send a draft that was not paid, the creditor would have no claim against the debtor.⁶⁴ Of course, the owner of paper can, if he pleases, send it directly to the drawee bank for payment; and when this is done, the bank is his agent for making the collection and is governed by the same principles.⁶⁵

6. Remittance by Mail Cannot be Recalled.

Until recently a remittance by mail could not be legally recalled. The question had been decided both ways. The Supreme Court of Wisconsin had declared that a drawee bank which had paid a depositor's check by remitting through the mail the amount by draft could not afterward recall the letter on learning of the depositor's failure, or the insufficiency of his deposit to pay the check charged to his account.⁶⁶

64 Farwell v. Curtis, 7 Biss. (U. S.) 160; Anheuser-Busch Brewing Assn. v. Clayton, 6 C. C. A. (U. S.) 108; Wagner v. Crook, 167 Pa. 259; Exchange Bank v. Sutton Bank, 78 Md. 577; Anderson v. Rodgers, 53 Kan. 542; Minneapolis Sash Co. v. Metropolitan Bank, 76 Minn. 136; O'Leary v. Abeles, 68 Ark. 259.

65 Welge v. Batty, 11 Ill. App. 461; Whiting v. City Bank, 77 N. Y. 363; Arnot v. Bingham, 55 Hun (N. Y.) 553; O'Leary v. Abeles, 68 Ark. 259. In Welge v. Batty, 11 Ill. App. 461, a vendor drew at sight for the amount of his bill, and sent it endorsed "for collection" to the debtor's banker to be collected. The debtor having ample funds, the amount was charged to his account and the banker then sent his check for the amount to the vendor. Before its collection the banker failed. Nevertheless the original debt was regarded as paid, because the banker had the debtor's money in his possession. In effect, he had collected the money, but had not paid it over. See Kinney v. Paine, 68 Miss. 258. In Farwell v. Curtis, 7 Biss. (U. S.) 160, the payee of a check sent it by mail to the drawee for collection. The drawee became his agent and was liable for neglect in presentation.

66 See Postal Laws, 1902, §§578, 579, giving the right to withdraw letters. Canterbury v. Bank, 91 Wis. 53; Whiting v. City Bank, 77 N. Y. 363; Gregg v. Bi-Metallic Bank, 14 Col. App. 251. In McDonald v. Chemical Nat. Bank, 174 U. S. 610, 620; Shiras, J., said: "Nor can it be conceded that, except on some extraordinary occasion, and on evidence satisfactory to the post-office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in the post-office, they are within the legal custody of the officers of the government, and it

This is not a logical and correct application of a more general rule. It is true that in making contracts by letter the mail is the agent of the offerer in every state perhaps in sending his offer and also in conveying the offeree's reply. But in other matters the mail is the agent of the sender. Why, then, should he not control the action of his agent, subject to the regulations of the national government, until the letter has actually been received by the addressee?⁶⁷

In applying this rule perhaps a distinction should be drawn between a sender who is an agent and one who is a non-agent of the addressee. If a bank is acting as the agent of another in making collections, for example, it may be properly held that

is the duty of the postmaster to deliver them to the persons to whom they are addressed." Citing *United States v. Pond*, 2 Curt. (U. S.) 265; *Buell v. Chapin*, 99 Mass. 594; *Morgan v. Richardson*, 13 Allen (Mass.) 410; *Taylor v. Merchants Fire Ins. Co.*, 9 How. (U. S.) 390.

Contra.—*Steinhart v. National Bank*, 94 Cal. 362. This decision, however, is based on the peculiar law prevailing in California concerning the right to correct mistakes and make reclamations; see *Interstate Nat. Bank v. Ringo*, 83 Pac. (Kan.) 119.

67 *Carley v. Potters' Bank*, 46 S. W. (Tenn. Ch. App.) 328; *United States v. Tanner*, 6 McLean (U. S.) 128. A bank is charged with notice of letters duly mailed to it and received by the general bookkeeper, whose duty consists in opening and distributing them. *First Nat. Bank v. Fourth Nat. Bank*, 6 C. C. A. 183. A bank is answerable therefor though he conceals them to hide his own irregularities and to prevent them from coming into the possession of the bank's officers. *Ibid.* The case of *Barrett v. Dodge*, 16 R. I. 740, 743, related to a note sent by the payee to the maker to be signed. "In the absence of instruction to the maker as to the mode by which he should return it when signed, the payee must have contemplated that the maker would return it by the natural and ordinary mode of transmitting such obligations, and must be deemed to have authorized him so to return it. The natural and ordinary mode of transmitting them was by mail, the mode adopted by the maker. In such cases the post-office may be regarded as the common agent of both parties; of the maker for the purpose of transmitting the note, and of the payee for the purpose of receiving it from the maker. By depositing the note in the mail with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it, and the delivery is in legal contemplation complete." The court cited *Kirkman v. Bank of America*, 2 Cold. (Tenn.) 397; *Household Fire Ins. Co. v. Grant*, L. R. 4 Ex. Div. (Eng.) 216; *King v. Lambton*, 5 Price (Eng.) 428; *Garrigue v. Kellar*, 164 Ind. 676, 687.

after the delivery of the check or other remittance to the mail it is within the control of the addressee, or principal, for it is within his direction at all times. But when the remitting bank is a debtor to, and not an agent of, the addressee, ought not the remittance while in the possession of the mail to be regarded as within the sender's control, subject to the paramount right and order of the government? The highest federal tribunal, however, seemed to disregard the distinction in the case of a debtor bank that was solvent when making a remittance, but passed into insolvency before it reached the receiver, though knowledge of the event had not reached the receiver at the time of crediting the remittance.⁶⁸

Even if the title to a remittance by a debtor bank passes after the latter has been placed in the mail, the rule does not apply, if the sending bank is about to fail and takes such action to give a preference to the receiving bank. In the McDonald case the remittance was sent and applied in good faith; neither bank intended any wrong. Nevertheless, the rule cuts across a more general one, that all letters deposited in the post office are, subject to the paramount control of the government, within the sender's control; in other words, the government is the sender's agency. If so, and the sending bank has failed before their delivery, do they not belong to the receiver? The ruling, therefore, must be regarded as an invasion of the more general law.

The rule was long ago established concerning a bill of exchange, that as soon as it is accepted and mailed it becomes the property of the person to whom it is sent.⁶⁹

7. Loss by Mail.

A bank is not liable for the loss of a note received for collection that is lost in the mail during its return from a responsible correspondent to which it has been sent to complete the work.⁷⁰ Nor is a bank liable, acting on the instructions of its

68 McDonald v. Chemical Nat. Bank, 174 U. S. 610.

69 Mitchell v. Byrne, 6 Rich. Law (S. C.) 171, 182.

70 Litman v. Montreal C. & D. Sav. Bank, Rap. Jud. de Quebec, 13 C. S. 262.

customer, that sends a draft by mail which is delivered by the postmaster to another person of the same name as the addressee who, through forgery, obtains and appropriates the proceeds.⁷¹

8. Circuitry of Presentation.

The cases are not infrequent in which banks from lack of correspondents resort to circuitous methods to make presentation. There is a risk attending this, as the drawee may fail during the interval. The courts have decided that banks cannot resort to a slow, irregular method, instead of direct one, without rendering themselves chargeable for negligence.⁷² But this rule does not apply to the collection of bills of exchange drawn between different countries. Their collection need not be direct, but in the manner justified by the course of trade.⁷³

9. What Can be Received in Payment.

(a.) The most general rule is that, save by express authority, money only can be received in payment.⁷⁴ Not even a certified

⁷¹ *Rossi v. National Bank*, 71 Mo. App. 150. The presumption is that letters directed and mailed to a person at his place of residence were received by him. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; *Huntley v. Whittier*, 105 Mass. 391; *Briggs v. Hervey*, 130 Mass. 186; *Ripley Nat. Bank v. Latimer*, 64 Mo. App. 321.

⁷² *First Nat. Bank v. Miller*, 37 Neb. 500; *Bedell v. Harbine Bank*, 62 Neb. 339; *Gifford v. Hardell*, 88 Wis. 538; *First Nat. Bank v. Buckhannon Bank*, 80 Md. 475; *Herider v. Phoenix Loan Assn.*, 82 Mo. App. 427; *Stockton v. Montgomery*, 9 Kan. App. 105. In this case the presentment was held to have been made with due diligence. *Gregg v. Beane*, 69 Vt. 22. The rule in Vt. was set aside by the legislature, No. 38, Acts of 1896. See also *Wynen v. Schappert*, 6 Daly (N. Y.) 558, 563, 565.

Contra.—*Taylor v. Sip*, 30 N. J. Law 284, 291.

⁷³ *Wallace v. Agry*, 4 Mason (U. S.) 336.

⁷⁴ *State Bank v. Byrne*, 97 Mich. 178, 179; *Pitkin v. Harris*, 69 Mich. 133; *Hurley v. Watson*, 68 Mich. 531; *Bank of Indian Territory v. First Nat. Bank*, 83 S. W. (Indian Terr.) 537; *Noble v. Doughten*, 83 Pac. (Kan.) 1048; *Griffin v. Erskine*, 107 N. W. (Iowa) 13, 16; *Bank v. Union Trust Co.*, 149 Ill. 343; *Waterhouse v. Citizens' Bank*, 25 La. Ann. 77; *National Bank v. American Ex. Bank*, 151 Mo. 320; *Gowling v. American Ex. Co.*, 102 Mo. App. 366; *National Bank v. Johnson*, 6 N. Dak. 180; *Pepperday v. Citizens' Nat. Bank*, 183 Pa. 519; *Hazlett v. Commercial Nat. Bank*, 132 Pa. 118; *Fifth Nat. Bank v. Ashworth*, 123 Pa. 212; *Harrington*

check,⁷⁵ which in a popular sense is regarded as money, can be taken. When, therefore, a collector receives a check, draft, or other substitute, the risk of payment is assumed until the money due thereon is paid, or the depositor is credited with the amount.⁷⁶ The collector cannot prolong the liability of the drawer or endorsers of the original paper without their consent, and any one-sided action by the collector will not bind them.⁷⁷

(b.) By a less general rule a collecting bank is justified by

v. Merchants' Nat. Bank, 17 Phila. 38; Anderson v. Gill, 79 Md. 312, 318; Whitney v. Esson, 99 Mass. 308; Hall v. Storrs, 7 Wis. 253; People's Nat. Bank v. Brogden, 83 S. W. (Tex.) 1098; Ward v. Smith, 7 Wall. 451; Merchants' Nat. Bank v. Samuel, 20 Fed. 664; Ward v. Evans, 2 Ld. Ray. (Eng.) 928.

In Midland Nat. Bank v. Brightwell, 148 Mo. 358, the court says the collecting bank can "receive in payment nothing but money, or that which by common consent is considered and treated as money." A national bank voluntarily acting as agent for a depositor sent securities to a broker for sale, who returned a check for the proceeds that was credited to the depositor. Before the bank could collect this, acting with due diligence, the broker failed. Having charged back the amount to the depositor, who had previously drawn it out, he sued therefor and recovered. The bank was regarded negligent in having received a check instead of money in payment. Pepperday v. Citizens' Nat. Bank, 183 Pa. 519. Three of the seven judges dissented. A collecting bank cannot receive a part of the amount due. Lowenstein v. Bresler, 109 Ala. 326. A collector that receives money of varying value, must bear the loss from depreciation while retained whenever the debtor and creditor relation exists between the collecting and sending banks. Marine Bank v. Fulton Bank, 2 Wall. (U. S.) 252; Strauss v. Bloom, 18 La. Ann. 48.

75 Essex Co. Nat. Bank v. Bank, 7 Biss. (U. S.) 193. But such a check, should the bank fail before its collection, may be claimed by the owner of the paper for which it was given in payment. Levi v. National Bank, 5 Dill. (U. S.) 104.

76 Bank v. Union Trust Co., 149 Ill. 343; Boylston Nat. Bank v. Richardson, 101 Mass. 287; Whitney v. Esson, 99 Mass. 308; National Bank v. American Ex. Bank, 151 Mo. 320; Noble v. Doughten, 83 Pac. (Kan.) 1048; Hazlett v. Commercial Nat. Bank, 132 Pa. 118; Fifth Nat. Bank v. Ashworth, 123 Pa. 212. See Canterbury v. Bank, 91 Wis. 53. See Chap. XXIII. §5b.

77 Simpson v. Pacific Mutual Life Ins. Co., 44 Cal. 139; Noble v. Doughten, 83 Pac. (Kan.) 1048; Anderson v. Gill, 79 Md. 312, 318. See Comer v. Dufour, 95 Ga. 376.

custom or usage in accepting from the debtor a check or draft on its own or another bank in payment of the paper received for collection,⁷⁸ and also in sending back to the first bank a draft drawn on a reputable banking institution.⁷⁹ Even if a collecting bank can legally receive only money, yet if it accepts other paper, a draft returned from a sub-agent for a check would work a ratification by the agent of the sub-agent's act in sending the draft in payment.⁸⁰

(c.) The first collecting bank or agent, in states where checks and drafts may be taken instead of money in payment, must act with great diligence in presenting the second check or draft for payment, otherwise it is responsible for the delay.⁸¹

⁷⁸ Kirkham v. Bank, 165 N. Y. 132, 137; Smith v. Miller, 43 N. Y. 171, and 52 N. Y. 545; Noble v. Doughten, 83 Pac. (Kan.) 1048, 1056; Citizens' Bank v. Houston, 98 Ky. 139; Farmers' Bank v. Newland, 97 Ky. 464; Kershaw v. Ladd, 34 Or. 375; Jefferson Co. Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337; Union Nat. Bank v. Citizens' Bank, 153 Ind. 44. See National Life Ins. Co. v. Goble, 51 Neb. 5 and Holder v. Western German Bank, 68 C. C. A. 554. A draft delivered to a bank for collection is given to a runner who accepts the drawer's check, marks the draft paid and delivers it to him. As soon as the runner returned, the collecting bank, knowing that the drawee had no funds in the bank, instructed the runner to return and get the draft. It was held to be not paid, for an agent has a right to receive only money in payment, and an overdraft check is no payment. Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535. "While the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored upon presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt." Griffin v. Erskine, 107 N. W. (Iowa) 13, 16.

⁷⁹ Ibid. A collecting bank that receives a draft from a sub-agent in return for a collection which is sent to a third bank for collection is liable to the owner of the original draft should the second draft not be paid. St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, revg. 59 Hun 383.

⁸⁰ Union Nat. Bank v. Citizens' Bank, 153 Ind. 44.

⁸¹ First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320 and 89 N. Y. 412; Syracuse R. v. Collins, 3 Lans. (N. Y.) 29, affd. 57 N. Y. 641; Smith v. Miller, 43 N. Y. 171 and 52 N. Y. 545; Kirkman v. Bank, 165 N. Y. 132; Nunnemaker v. Lanier, 48 Barb. (N. Y.) 234; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; East River Bank v. Gedney, 4 E. D. Smith (N. Y.) 582; Merchants' Nat. Bank v. Bank, 24 Md. 12; Morris v. Eufaula Nat. Bank, 122 Ala. 580,

The ordinary rules relating to presentation do not apply. In *Smith v. Miller*,⁸² the court declared that "a delay of presentation for a day or for any time beyond that within which with proper and reasonable diligence it can be presented is at the peril of the party thus retaining the check and postponing presentation as between him and the persons in interest, whom he represents." Again, if the collecting agent's messenger receives from a drawee bank, to which he has been sent with a check, another check in payment drawn on a bank within a short distance, he should continue his journey and collect the second check before returning to his bank.⁸³ On the other hand, if a check, taken for a note sent for collection, proves worthless, but the note is regained and the rights of the owner are in no way prejudiced by such action, he has no claim against the collector.⁸⁴

(d.) When the draft thus received for collection is not paid the collector must take proper steps to fix the liability of all parties; having done this, its duty is done.⁸⁵ Nor will the crediting of such a draft to the depositor as soon as it is received prevent the bank from charging it back if it is not paid, unless the bank has been negligent in collecting it. But if it has been, then the credit will stand as an actual payment and the collecting bank must seek redress from another source.⁸⁶

The owner, too, can act in another way. He may reclaim the original check or other paper sent for collection, protest it

overruling 106 Ala. 383; *Anderson v. Gill*, 79 Md. 312, 321; *Comer v. Dufour*, 95 Ga. 376; *Noble v. Doughten*, 83 Pac. (Kan.) 1048; *Farwell v. Curtis*, 7 Biss. (U. S.) 160. See *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139; *Merchants' Nat. Bank v. Samuel*, 20 Fed. 664. A collecting bank that received the check of the drawee of a draft on a local bank in payment of the draft is not negligent in waiting until the next day and presenting the same for payment through the clearing house. *Turner v. Bank*, 3 Keyes (N. Y.) 425, 426.

82 43 N. Y. 171, 176.

83 *Anderson v. Gill*, 79 Md. 312.

84 *Interstate Nat. Bank v. Ringo*, 83 Pac. (Kan.) 119.

85 *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538, 541; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320.

86 *Kirkham v. Bank*, 165 N. Y. 132.

and notify all the parties thereon, and seek to recover from them.⁸⁷

(e.) Should a collecting bank accept a check from a debtor in payment of his note, or other form of indebtedness, instead of money, and credit the owner of the collection with the amount, the bank cannot recover the same from the creditor on the debtor's failure to pay his check given in payment of his original indebtedness. The collector's mistake in thus accepting a worthless check is his own for which the creditor is in no way responsible.⁸⁸

Banks often do receive in payment checks drawn on themselves, and their own certificates of deposits,⁸⁹ and in so doing have abundant judicial sanction, but they cannot receive a note or other claim against themselves, however valid it may be, in payment.⁹⁰ And the reason is still stronger for not receiving other notes or obligations in payment, or in the way of exchange, or substitution.⁹¹

(f.) As we have seen a drawee bank that receives from another bank a check for collection, which is credited to the drawer's account, the check as between him and the drawee is paid provided his deposit be ample, or his credit justifies the bank in making an overdraft. To this rule must be added that the

87 First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320.

88 National Bank v. American Ex. Bank, 151 Mo. 320.

89 British Mortgage Co. v. Tibbals, 63 Iowa 468; (see criticism of this case, Bank v. Ingerson, 105 Iowa 349, 354); State Bank v. Byrne, 97 Mich. 178. See Marine Bank v. Chandler, 27 Ill. 525; Drain v. Doggett, 41 Iowa 682; McCarver v. Nealey, 1 Greene (Iowa) 360.

Contra.—Francis v. Evans, 69 Wis. 115; State Bank v. Byrne, 97 Mich. 178, 181.

90 Scott v. Gilkey, 153 Ill. 168; Bank of Montreal v. Ingerson, 105 Iowa 349, 355; State Bank v. Byrne, 97 Mich. 178.

Contra.—Citizens' Bank v. Houston, 98 Ky. 139.

Should a collecting bank accept a new note instead of money in payment of a note sent for collection, the maker could hold the assignee of the bank which subsequently fails as his trustee for the amount. Harrison Nat. Bank v. Ellicott, 31 Kan. 173.

91 Franklin Sav. Bank v. Colby, 105 Iowa 424.

bank also is in a solvent condition and that the crediting is not mere bookkeeping.⁹²

But if the drawee bank, instead of remitting the money thus credited to the drawee in payment, sends a draft on another bank which is not paid by reason of the drawer's failure, can the original bank that sent the collection recover the money as a trust fund? Two opinions prevail, one that the money, even though not segregated, is a trust fund, and may be collected from the receiver;⁹³ the other opinion is, as the collecting bank did not add anything to its resources by its action, there is no trust fund in its possession; it is a simple creditor for the amount.⁹⁴ It is true that no addition is made to the bank's resources, but if, at the time of paying, the bank is solvent and has the money in its actual possession, that is charged to the debtor and credited to the payee, why should not this be regarded as a trust fund belonging to the payee, as much so as if it had been paid into the bank? The essential thing about the recovery of a trust fund is its actual existence; surely the fund is not a myth when it has a real existence.

10. Money Paid by Debtor is a Trust Fund Until Completion of Collection by Payment of Second Paper.

It is a common practice for a bank receiving a check from another bank and place to send a draft on a more central bank in payment. Occasionally, before the first bank receives payment of the draft, the drawer has failed and the drawee bank refuses payment. The first bank then seeks to establish a trust or preference on the ground that the draft sent was payment, or that the second bank was an agent for the other. Sometimes the liability has turned on the nature of an endorsement, or a special agreement. In some cases the preference has been favor-

⁹² *People v. Merchants' & Mech. Bank*, 78 N. Y. 269. See Chaps. XVI. §9 and XIII. §9.

⁹³ *People v. Bank of Dansville*, 39 Hun (N. Y.) 187; *Arnot v. Birmingham*, 55 Hun 553; *Kinney v. Paine*, 68 Miss. 258. See Chap. XVI. §10.

⁹⁴ *People v. Merchants' & Mech. Bank*, 78 N. Y. 269; *Anheuser-Busch Brewing Assn. v. Clayton*, 6 C. C. A. 108.

ably regarded,⁹⁵ in a larger number denied.⁹⁶ The correct answer, we think, does not wholly turn on the sending of the draft, for the reason that whether the collecting bank is an agent or debtor in the transaction, its method of making payment by draft is the same. Thus two banks acted as agents to collect for each other, having mutual accounts and settlements and crediting collections as soon as made without waiting for the collection of the check or draft usually given by a debtor in payment of the first. One of the collecting banks

95 Chap. XVII. §8. *Mad River Nat. Bank v. Melborn*, 8 Ohio C. Ct. 191; *Ryan v. Paine*, 66 Miss. 678; see *Kinney v. Paine*, 68 Miss. 258; *People v. Bank of Dansville*, 39 Hun (N. Y.) 187; *Foster v. Rincker*, 4 Wy. 484; *Continental Nat. Bank v. Weems*, 69 Tex. 489. See *Corn Ex. Bank v. Lancaster Nat. Bank*, 118 N. Y. 443. "The money received by the collector belongs to the creditor as much so as the paper, given up to the paying debtor. If, instead of remitting money, the collector sends a draft drawn on a reputable correspondent which is more usual, the creditor does not receive payment until the draft is paid. To hold otherwise," says the court in a well reasoned case, "would be tantamount to saying that the title to these proceeds might pass from the owner without his consent or knowledge." *Foster v. Rincker*, 4 Wy. 484, 491. A, a creditor of B, drew on him for the amount through the bank C, to which the draft was endorsed for collection. B was a customer of the bank who gave it a check for the amount though this somewhat overdraw his account. The bank charged him with the check and sent a draft to A on New York for the amount and failed before its collection. The assets of the bank were impressed with a trust in A's favor. *Ryan v. Paine*, 66 Mass. 678. See *Kinney v. Paine*, 68 Miss. 258. A national bank A collected a note for an individual by accepting a draft for the amount drawn on bank B. The collector sent a draft to the owner of the note for the amount drawn on bank C, and at the same time sent to bank C the other draft received from the maker of the note. The C bank collected the draft, but before the owner of the note collected his draft sent by A bank, it failed. The fund collected by the C bank was declared to be impressed with a trust in favor of the owner of the note. *Foster v. Rincker*, 4 Wy. 484. A draft endorsed to a bank for collection with direction to remit New York exchange was paid by the drawee and the draft was cancelled. His payment, however, was an overdraft which, after the bank's assignment, he paid to the assignee. No trust was thereby created in his favor for the amount of the draft, as he had simply paid his debt. *Akin v. Jones*, 93 Tenn. 353.

96 *Bowman v. First Nat. Bank*, 9 Wash. 614; *Union Nat. Bank v. Citizens' Bank*, 153 Ind. 44; *Frank v. Bingham*, 58 Hun (N. Y.) 580; *Akin v. Jones*, 93 Tenn. 353; *Billingsley v. Pollock*, 69 Miss. 759; *Levi v. National Bank*, 5 Dill. 104, 222. See *Anheuser-Busch Brewing Assn. v.*

failed after crediting the second check received from a debtor in payment of the first, which had come from the sending bank. The first bank claimed the second check, but it was rightfully retained by the receiver of the other, for distribution among all the creditors.⁹⁷

Whether a preference shall be given to the draft depends on an ulterior fact, was the bank that made the collection the agent or debtor of the other party? If it was an agent, then the draft constitutes a preference, which will attach to the money collected if in the bank's possession at the time of its failure. If the collecting bank was a debtor, then no trust attaches to the money collected and consequently none to the draft. The courts have, we think, correctly applied the principle in most cases to the facts as they interpreted them; but in many of the cases a trust or agency relation was declared which other courts perhaps would have doubted or denied.

There is another point worth attention. On all occasions of this character, in which an attempt is made to establish a trust, two questions lie at the bottom of the inquiry: First, did a trust

Clayton, 6 C. C. A. 108; Sherwood v. Milford State Bank, 94 Mich. 78; Thuemmler v. Barth, 89 Wis. 381. A bank that presents checks against another for payment and, instead of receiving money, accepts a check on another bank, has no trust or preference over other creditors should the drawee fail before paying its obligation. Farmers & Mechanics' Bank v. Cuyler, 18 Pa. Super. Ct. 434. Other points were decided in this case worthy of note: 1. The drawers of the checks thus presented by the first bank to the other were entitled to have them charged to their accounts as paid; 2. That the second bank became a direct debtor to the first bank for the amount of them; 3. That the first bank was liable to the holders as though money had been paid for them because this only could be received save at its risk. A bank sent checks to the drawee bank for collection, that were charged to the makers and a draft on New York, where the drawer had ample funds, was sent in return. No trust or preference was created for the sound reason that no assets came into the receiver's possession. "There is nothing," said the court, "to show that any tangible thing was received by the bank upon these checks, and consequently there is no such fund in the hands of the receiver. The doctrine contended for would practically be to admit the establishment of a lien upon all the property of the bank through a mere matter of bookkeeping." Sunderlin v. Mecosta Co. Sav. Bank, 116 Mich. 281.

97 Franklin Co. Nat. Bank v. Beal, 49 Fed. 606.

exist? Second, did a trust fund exist anywhere within the power of judicial recovery? Assuming that in many of the cases within the class under consideration a trust existed, there may have been a failure to collect the money because it did not exist. Now, does the giving of a draft on a bank where the collector has money earmark it and set it aside especially for its payment? In other words, does the sending of a draft assign the fund in the possession of the drawee? No rule is better established than this, that a drawer who has funds in the drawee's possession does not give the holder of his draft any lien thereon by delivery of the draft. There is no reason why the draft of a bank collector should form any exception to the universal rule.

While the draft sent in payment furnishes no proof of the original relation between the parties, whether it was a debtor or trust relation, it may be decisive proof of another fact, namely, that the collection was not completed as between the receiving and collecting bank. It is a fundamental rule that when a check or other obligation is given in payment of a bill or other debt it is not discharged until payment of the check. And when it is not paid, ordinarily the creditor may proceed on the original form of debt, or the second form, as may be for his interest. As no one will question this, how can a collection be regarded as completed, unless some rule or custom ordains otherwise, in which a draft is given for a check until the draft is paid? In effect, one instrument has been exchanged for another; the second may and usually does possess higher credit, but it is, after all, only a substitute. As the collection is then continuing and will continue until payment is made, the agency relation continues, and therefore the fund on which the draft is based, if existing, rightfully belongs to the owner of the original instrument deposited for collection and he should have it. By the application of this rule it is not difficult in many cases to establish a trust relation. It may be properly applied to almost all single collections.

On the other hand, the distinction must be kept in sight between the cases in which the sending bank is the owner of the

paper sent, and those in which it is serving as agent. As we have already seen,⁹⁸ where it is acting as agent, it cannot transform its agency without its principal's knowledge and express or implied assent into any other relation to his injury. But when the sending bank is the owner through proper endorsement, or by advances to the depositor, specific agreement, or any other manner, then it is just as free to establish a debtor and creditor relation with a collecting bank as with a depositor.⁹⁹ More than once a sending bank that was only an agent of paper without intending any wrong, and chiefly for convenience, has attempted to transform its agency into a debtor and creditor relation; but we repeat, a third party ought not to suffer by the transformation unless it has in some way agreed thereto.

11. Unusual Payment to Avoid Loss.

There are occasions in which a bank is justified in taking anything in payment, especially when the payee is on the edge of failure. The conditions that will justify such action are very dissimilar and the only rule that can be evolved from them is, a bank can never do this except when the payee is in a desperate condition and there is no other way of securing the debt.¹

Surely at such a time a bank should act promptly.² Thus a bank, after warning a customer of the impending failure of another bank and receiving a check from him drawn thereon for collection, instead of presenting it promptly for payment, was

⁹⁸ Chap. XVII. §8.

⁹⁹ Kingsland Assignment, 28 Chicago Leg. News, 14, citing many cases.

¹ Citizens' Bank v. Houston, 98 Ky. 139. See Chap. 20, §17. A bank that accepts for a note the check of a third person for part of the amount and a new note for the balance may, nevertheless, on the dishonor of the check, maintain an action on the original note against the maker to recover the amount of the check. The delivery of the old note and acceptance of the check and new note is not evidence that they were received in payment. Olcott v. Rathbone, 5 Wend. (N. Y.) 490. See Kean v. Dufresne,

³ Serg. & R. (Pa.) 233.

² Citizens' Bank v. Houston, 98 Ky. 139.

content with the drawee's certification. Such action clearly was negligence.³

12. Recovery of Collection by Bank Paid by Mistake.

(a.) Sometimes in making payment mistakes are made which the erring and losing party seeks to have corrected.⁴ These mistakes are made in several ways. Let us consider first those made by the drawee bank. They may happen through the mistake of a subordinate. Such a mistake, made in violation of the order of his superior, may be corrected.⁵

3 Légaré v. Arcand, 9 Rap. Jud. de Que. R. B. 122.

4 See §6, and Chap. XX. §34.

5 Carley v. Potters' Bank, 46 S. W. (Tenn. Ch. App.) 328, 330. A note with securities became due and the maker offered to give the collecting bank a draft in payment. The bank offered to send the draft for collection and, if paid, to apply the proceeds in payment of the note. The cashier by mistake supposing that the draft had been paid, cancelled and delivered the note. The bank, however, recovered both from the maker and sureties. Dewey v. Bowers, 4 Ired. Law. (N. C.) 538. A bank by mistake credited a depositor with the amount of a note left for collection. It afterward erased the credit from his book, but the depositor gave the bank notice that he claimed the amount. By suing the debtor on the note in its own name the bank assumed the property in the note and was liable to the depositor therefor. Wetherill v. Bank, 1 Miles (Pa.) 399. A bank that sent a sight draft to its correspondent for collection presuming, after a lapse of proper time that it had been paid, credited its depositor with the amount. On discovering its error it recovered the amount as money paid by mistake, the fact duly appearing that the depositor would be no worse off than he would have been had credit to him therefor been given. First Nat. Bank v. Behan, 91 Ky. 560. A bank received from the agent of the maker of a note the money to pay it. By mistake it returned to him another note and protested for non-payment his principal's. As soon as the principal discovered he had the wrong note, he returned it and demanded his money, for in the meantime he had paid his own note to bank B, to which it had been sent after protest. He recovered his money with interest. As bank A had sent the money it received to the holder of the other note, it could not recover the amount from the maker because he was insolvent, nor from the endorsers because they had been discharged by the delay in collection. Andrews v. Suffolk Bank, 12 Gray (Mass.) 461.

A sub-agent acting under the impression that a note sent to it for collection had been collected, sent the amount to the agent which was paid over to the holder. The sub-agent maintained an action against the holder for its recovery. Bank of Orleans v. Smith, 3 Hill (N. Y.) 560. A sub-agent sent a note to a second sub-agent for collection. Failing to collect

(b.) Again, a mistake that may entail a loss either on the drawee bank or another innocent party, must be borne by the author, the drawee. Thus the holder of a bill of exchange sent it to A bank for collection. The bank endorsed the bill and sent it to B bank for the same purpose, which, in turn, sent it to C bank, the drawer, which by mistake paid it, and the money was transmitted in due course to the holder. In an action by C bank against A bank it failed to recover; the mistake was its own and there was no reason why A bank, having parted with the money, should be responsible therefor.⁶

(c.) Lastly, may be mentioned a mistake by the first bank which, failing to receive from its correspondent after due time notice of the non-payment of paper sent for collection, presumes it has been paid. Acting on this presumption, if it pays over the amount to the owner of the paper it may, on discovering its mistake, recover the money.⁷

if the second sub-agent protested it and sent notice to the agent, first sub-agent and other parties. The first sub-agent, not receiving the notice and supposing the note had been paid, remitted the amount to the agent. It recovered the amount from the agent on the ground that it had been paid by mistake. *Union Nat. Bank v. Sixth Nat. Bank*, 43 N. Y. 452.

If a check is sent by the payee of a draft to pay it and when received the draft is marked "paid," and the check is duly and properly sent to the drawee for payment, but dishonored, the collecting bank is guilty of no negligence and cannot be held simply because it stamped the draft "paid." The court declared that "the course of business between the bank and the [payor of the draft] justified charging this check back to him, it having been by mistake passed to his credit." *Bank v. Cummings*, 89 Tenn. 609, 619-621. C being indebted to D drew a draft on S, payable in thirty days from date, and delivered it to D, who placed it in a bank for collection. Before its maturity D was notified that it had been paid and drew out a portion of the money. C, who was insolvent, upon receiving notice of the payment of the draft, called at the bank, expressed his suspicion and stated that he was anxious to protect the draft if it was not paid. Afterward the discovery was made that the draft had not been paid. It was held that as D had lost no rights against C in consequence of the mistake, the bank could recover. *De Nayer v. State Nat. Bank*, 8 Neb. 104.

⁶ *Deutsche Bank v. Beris*, 73 Law Times (N. S.) 669; *Skyring v. Greenwood*, 4 B. & C. (Eng.) 281; *Pollard v. Bank of England*, L. R. 6 Q. B. 623; *Chambers v. Miller*, 13 C. B. (N. S. Eng.) 125.

⁷ *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384. If the money "is paid

(d.) The rights and liabilities of banks in collecting and paying forged paper have been set forth in another chapter.⁸

13. Recovery of Collection by Depositor from Possessory Bank.

A depositor who deposits paper for collection which is sent to another bank for that purpose, is collected and credited by the first bank to the depositor, may recover the proceeds from the second or collecting bank should the other fail before receiving them and paying them over.⁹

14. Collections Sent to Third Person by Depositor's Order.

Sometimes a collecting bank is directed to make a collection and send it to another person. While the third party may not become a trustee on the failure of the collecting bank with the right to follow the fund into the hands of the receiver,¹⁰ the owner of the note or check sent for collection may be able to recover the instrument, or the proceeds as a trust fund, if they have been collected. Thus the holder of a draft instructed a bank in St. Louis to collect it and remit the proceeds to a banker to the holder's credit. It was paid by the drawee to the second or receiving bank by another draft which it sent to a third bank

under the impression of the truth of the fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been to use diligence to inquire into the fact." Kelly v. Solari, 9 Mees. & Wels. (Eng.) 54; Union Nat. Bank v. Sixth Nat. Bank, 43 N. Y. 452, 455; Bank of Orleans v. Smith, 3 Hill (N. Y.) 560. "It is settled in England that where money is received under a mistake of fact it is no defense that the money has been paid over to another unless the defendant, who received the money, was a mere agent of that other person, that is to say, unless the payment was in legal effect a payment to the other person." Moors v. Bird, 190 Mass. 400, 409, citing Newall v. Tomlinson, L. R., C. C. P. (Eng.) 405; Phetepplace v. Bucklin, 18 R. I. 297; Koontz v. Central Nat. Bank, 51 Mo. 275; Kingston Bank v. Eltinge, 40 N. Y. 391; Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74.

8 Chap. XXIV. §§11, 18.

9 Armstrong v. National Bank, 90 Ky. 431. See Chap. XVII. §§10-16.

10 Merchants & Farmers' Bank v. Austin, 48 Fed. 25. See Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. 880. A bank that credits the sum collected on a draft to a third person (who also is a depositor) by order of the owner of the draft, extinguishes the debt to such owner. Weedsport Bank v. Park Bank, 2 Rob. (N. Y.) 418, affd. 41 N. Y. 561.

for collection. The third bank collected the second draft and sent the proceeds to the second bank, which, being insolvent, disobeyed instructions and sent to the St. Louis bank a third draft drawn on a bank in New York, instead of sending the proceeds to the banker designated by the holder of the first draft. Nevertheless he collected them from the assignee of the insolvent bank.¹¹

15. Drawee Bank Receiving Check for Collection Should Promptly Pay or Decline to Pay.

A bank that receives for collection a customer's check should pay the same on its receipt, or give prompt notice of its dishonor in order to charge the drawer and endorser. The law gives the drawee time enough to examine its books to ascertain the condition of the drawer's account, but no more.¹²

16. Release of Debtor on Payment to Collector.

After the debtor of paper sent for collection, whether drafts, checks, notes or other instruments, has paid it to the duly authorized agent, he is released. If the collector fails to pay it over to the depositor, this is no reason for exacting repayment of the debtor. The agent is chosen by the creditor and he alone is responsible for his agent's conduct.¹³

11 Hutchinson v. National Bank, 41 So. (Ala.) 143.

12 Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105; Wood River Bank v. First Nat. Bank, 36 Neb. 744; Minier v. Second Nat. Bank, 13 N. Y. St. Rep. 222.

13 Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 225; Colvin v. Holbrook, 2 N. Y. 126; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank v. Union Bank, 11 N. Y. 203; Howard v. Ives, 1 Hill (N. Y.) 263; Smith v. Essex Co. Bank, 22 Barb. (N. Y.) 627; Kupfer v. Bank, 34 Ill. 328; O'Leary v. Abeles, 68 Ark. 259; N. C. Corporation Commission v. Merch. & Farmers' Bank, 50 S. E. (N. C.) 308. See Chap. XVI. §5. A bank received a note made payable there for collection. Though the maker's account was not sufficient, the bank paid the note, charged the amount to his account and marked the note cancelled. This by the bank rule only meant that it had been charged to the maker. It was held to be a subsisting obligation. Watervliet Bank v. White, 1 Denio (N. Y.) 608. A collecting bank that remits the amount of a note out of its own funds to the owner of the note as though he had collected it,

17. Extension of Payments, or Made in Advance.

As banks must be prompt in their methods of presentation so must they decline to grant extensions,¹⁴ or accept partial payments.¹⁵ On the other hand, an agent who has authority to collect a note at maturity has none whatever to collect in advance. Consequently a payment made under such conditions will not discharge the debtor.¹⁶

18. Recovery by Endorser When Paying Without Knowledge of Collector's Negligence.

An endorser who pays a note or other obligation in ignorance of his discharge in consequence of the collector's failure to make proper presentation, can recover the amount from the collector.¹⁷

19. Collections for Non-Depositor.

Banks often act for non-depositors in making collections, and when thus acting the agency relation is still more clearly recognized. But when there is nothing on the paper to show this fact, and advances and other obligations are incurred by collectors, who act without any knowledge that the owner is a non-depositor, doubtless their rights are just as strong as in other cases.¹⁸

pays the obligation and not simply transfers it to the bank. *People's & Drov. Bank v. Craig*, 63 Ohio St. 374. If such payment is made with the maker's assent, he is liable for the money, otherwise he is not. *Ibid.*

¹⁴ *Omaha Nat. Bank v. Kiper*, 60 Neb. 33; *Central Ga. Bank v. Cleveland Nat. Bank*, 59 Ga. 667; *Mound City Paint Co. v. Commercial Nat. Bank*, 4 Utah 353. See *Crouse v. First Nat. Bank*, 137 N. Y. 383, affg. 61 Hun 618.

¹⁵ *Lowenstein v. Bresler*, 109 Ala. 320.

¹⁶ *Cunningham v. McDonald*, 83 S. W. (Tex.) 372.

¹⁷ *Merchants' Bank v. Bank*, 24 Md. 12; *Martin v. Home Bank*, 30 N. Y. App. Div. 498; *Carroll v. Sweet*, 128 N. Y. 19, 22; *Murray v. Judah*, 6 Cow. 490; *Little v. Phoenix Bank*, 2 Hill (N. Y.) 425; *Lake v. Artisans' Bank*, 3 N. Y. Ct. of App. Dec. 10; *Garland v. Salem Bank*, 9 Mass. 408; *Daniel Neg. Inst.* §1592.

¹⁸ *Nurse v. Satterlee*, 81 Iowa 491; *Wallace v. Stone*, 107 Mich. 190; *First Nat. Bank v. Sanford*, 62 Mo. App. 394; *Griffin v. Chase*, 36 Neb. 328; *Thompson v. Gloucester City Sav. Institution*, 8 At. (N. J. Eq.) 97; *People v. Bank*, 39 Hun (N. Y.) 187; *Blair v. Hill*, 50 N. Y. App. Div. 33, affd. 165 N. Y. 672. This is one of the best cases on the subject.

20. Action is for Negligence. Causes.

As a note endorsed for collection or in other similar manner still belongs to the endorser, he can maintain a suitable action in his own name to enforce his rights against the parties to the papers.¹⁹ The action is for negligence; a failure to perform properly an express or implied contract.²⁰ This failure may consist in not duly presenting the paper for acceptance,²¹ or payment,²² or for not taking a proper acceptance,²³ or not protesting notes and notifying endorsers,²⁴ or too soon,²⁵ or too

19 Smith v. Bayer, 79 Pac. (Or.) 497; White v. National Bank, 102 U. S. 658; Commercial Bank v. Armstrong, 148 U. S. 50; Sweeny v. Easter, 1 Wall. (U. S.) 166; Williams v. Jones, 77 Ala. 294; People's Bank v. Jefferson Co. Sav. Bank, 106 Ala. 524; Central Railroad v. First Nat. Bank, 73 Ga. 383.

20 Bank of Mobile v. Huggins, 3 Ala. 206; German Nat. Bank v. Burns, 12 Colo. 539; Merchants' & Manuf. Nat. Bank v. Stafford Nat. Bank, 44 Conn. 564; Georgia Nat. Bank v. Henderson, 46 Ga. 487; Tyson v. State Bank, 6 Blackf. (Ind.) 225; Armington v. Gas Light & Bkg. Co., 15 La. 414; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582.

21 Woolen v. N. Y. & Erie Bank, 12 Blatchf. (U. S.) 359; Tyson v. State Bank, 6 Blackf. (Ind.) 225; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459; Crawford v. La. State Bank, 1 Martin (N. S. La.) 214; Walker v. State Bank, 9 N. Y. 582; Durnford v. Patterson, 7 Martin 460.

22 Bedell v. Harbine Bank, 62 Neb. 339; First Nat. Bank v. Miller, 37 Neb. 500; Thompson v. State Bank, Riley (S. C.) 81; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330; Mechanics' Bank v. Merchants' Bank, 6 Met. (Mass.) 13; Branch Bank v. Knox, 1 Ala. 148; Bank v. Huggins, 3 Ala. 206; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Whiting v. City Bank, 77 N. Y. 363; Bank v. Kenan, 76 N. C. 340; First Nat. Bank v. Moore, 8 Am. Law Rec. (Ohio) 97; Bank v. Broomhall, 38 Pa. 135; Louisville Bkg. Co. v. Asher, 112 Ky. 138; Patriotic Bank v. Farmers' Bank, 2 Cranch C. C. (U. S.) 560; Bank v. Triplett, 1 Pet. (U. S.) 25; Mound City Paint Co. v. Commercial Nat. Bank, 4 Utah 353; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Tyson v. State Bank, 6 Blackf. (Ind.) 225; Ivory v. Bank, 36 Mo. 475; Armington v. Gas Light & Bkg. Co., 15 La. 414.

23 Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276; Walker v. Bank, 9 N. Y. 582.

24 Howard v. Bank, 95 N. Y. App. Div. 342; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Bank of Mobile v. Huggins, 3 Ala. 206; National Pahquioque Bank v. First Nat. Bank, 36 Conn. 325; Mount v. First Nat. Bank, 37 Iowa 457; Chapman v. McCrea, 63 Ind. 360; Locke v. Merchants' Nat. Bank, 66 Ind. 353; Bank v. Ober, 31 Kan. 599; Bamberger v. Bank,

late,²⁶ or not notifying them properly;²⁷ for not making protest,²⁸ or not protesting properly;²⁹ for not heeding instructions,³⁰ customs³¹ and usages;³² for not notifying the owner or remitter of paper of its non-acceptance,³³ or non-payment;³⁴ for lack of diligence in discovering a change in the domicile of

¹⁵ Ky. L. Rep. 361; Louisville Bkg. Co. v. Asher, 112 Ky. 138; Sprague v. Farmers' Nat. Bank, 63 Kan. 12; Canonge v. La. State Bank, 3 Martin (La. N. S.) 344; Miranda v. City Bank, 6 La. 740; Capitol State Bank v. Lane, 52 Miss. 677; Mechanics' Bank v. Merchants' Bank, 6 Met. (Mass.) 13; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330; Exchange Bank v. Sutton Bank, 78 Md. 577; West v. St. Paul Nat. Bank, 54 Minn. 466; Jagger v. National German-Am. Bank, 53 Minn. 386; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81; Steele v. Russell, 5 Neb. 211; Wood River Bank v. First Nat. Bank, 36 Neb. 744; Bank v. Keenan, 76 N. C. 340; Bellemire v. Bank, 4 Wh. (Pa.) 105; Thompson v. State Bank, Riley (S. C.) 81; City Nat. Bank v. Clinton Co. Nat. Bank, 49 Ohio St. 351; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459; Smedes v. Bank, 20 Johns. 372, affd. 3 Cow. 662; McKinster v. Bank, 9 Wend. (N. Y.) 46; Coghlan v. Dinsmore, 9 Bos. (N. Y.) 453; Ayrault v. Pacific Bank, 47 N. Y. 570; Whiting v. City Bank, 77 N. Y. 363; Bird v. La. State Bank, 93 U. S. 96; U. S. Bank v. Goddard, 5 Mason (U. S.) 366; Selz v. Collins, 55 Mo. App. 55; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 290.

The failure therefore of the drawee bank to pay a drawer's check, or to notify him of its non-payment, will discharge him from further liability should he be injured by such action of the bank. Exchange Bank v. Sutton Bank, 78 Md. 577. But if the endorser should receive adequate notice in some other way, or for some good reason none should be required, the collector would not be liable for neglect. West Branch Bank v. Fulmer, 3 Pa. 399; Hallowell v. Curry, 41 Pa. 322.

²⁵ Bank v. Broomhall, 38 Pa. 135.

²⁶ Bank of Hanover v. Kenan, 76 N. C. 340; Bamberger v. Bank, 15 Ky. L. Rep. 361.

²⁷ Cases in note 25; also Huff v. Hatch, 2 Dis. (Ohio) 63.

²⁸ Chapman v. McCrea, 63 Ind. 360; Bank v. Ober, 31 Kan. 599, 606; Canonge v. La. State Bank, 3 Martin (La. N. S.) 344; Capitol State Bank v. Lane, 52 Miss. 677; Louisville Bkg. Co. v. Asher, 112 Ky. 138; Mount v. First Nat. Bank, 37 Iowa 457.

²⁹ Haddock v. Citizens' Nat. Bank, 53 Iowa 542. A note payable on Sunday was left with a bank before maturity for collection. It was protested on the Thursday after its maturity, which was too late and discharged the endorser. Morris v. Bailey, 10 S. Dak. 507. Yet as the statutory changes were well understood concerning holidays and days of grace the bank was not held responsible. Morris v. Union Nat. Bank, 13 S. Dak. 329.

³⁰ See §1. Freeman v. Citizens' Nat. Bank, 78 Iowa 150; Finch v. Karste, 97 Mich. 20; Borup v. Nininger, 5 Minn. 523; Merchants' & Manuf.

persons liable on the paper,³⁵ or for the loss of it;³⁶ for sending paper directly to the maker for payment,³⁷ or for negligence concerning identification.³⁸

Notwithstanding the above rule concerning the right of the owner of a note to enforce its collection, a collecting bank by virtue of an endorsement for collection, or one of similar import, by statute or common law, can maintain a suit thereon for the benefit of the endorser. The words do not strictly create a contract of endorsement, but rather a power, whereby the en-

Nat. Bank v. Stafford Nat. Bank, 44 Conn. 564; People's Nat. Bank v. Freeman's Nat. Bank, 169 Mass. 129; West Branch Bank v. Fulmer, 3 Pa. 399; Wood River Bank v. First Nat. Bank, 36 Neb. 744; Bedell v. Harbine Bank, 62 Neb. 339; Davis v. First Nat. Bank, 118 Cal. 600; Whitney v. Merchants' Union Ex. Co., 104 Mass. 152. A bank that is entrusted to collect a check and credit the owner with the proceeds, which receives a draft in payment therefor from the bank to which the check was sent for collection has no right to return it at the drawer-bank's request, and consequently is liable for the amount to the owner of the check. Gregg v. Bi-Metallic Bank, 14 Colo. App. 251. The owner of a certificate of deposit left it "for collection when due." It drew interest only if held until maturity. The bank collected and paid the amount at once to the owner. It was held not negligent in not keeping the certificate until it was due and then collecting six months' interest. Ide v. Bremer Co. Bank, 73 Iowa 58.

31 Woolen v. N. Y. & Erie Bank, 12 Blatchf. (U. S.) 359; Sahlien v. Bank, 90 Tenn. 221; Warren Bank v. Suffolk Bank, 10 Cush. (Mass.) 582; Crouse v. First Nat. Bank, 137 N. Y. 383. In making collections banks are not responsible for an error of judgment, especially when no instructions have been sent to them. Sahlien v. Bank, 90 Tenn. 221.

32 Davis v. First Nat. Bank, 118 Cal. 600.

33 Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276; Merchants' & Manuf. Nat. Bank v. Stafford Nat. Bank, 44 Conn. 564; Bank v. Huggins, 3 Ala. 206; National Pahquioque Bank v. First Nat. Bank, 36 Conn. 325; Walker v. Bank, 9 N. Y. 582.

34 Wingate v. Mechanics' Bank, 10 Pa. 104; Selz v. Collins, 55 Mo. App. 55; Exchange Bank v. Sutton Bank, 78 Md. 577; Sprague v. Farmers' Nat. Bank, 63 Kan. 12.

35 La. State Ins. Co. v. La. State Bank, 3 Martin (La. N. S.) 610.

36 Exchange Bank v. Sutton Bank, 78 Md. 577; Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641; Davis v. First Nat. Bank, 118 Cal. 600.

37 Carson v. Fincher, 129 Mich. 687. But if the maker had no funds to pay it, and is given timely notice of non-payment his liability continues notwithstanding the defective presentment. *Ibid.*

38 Davis v. First Nat. Bank, 118 Cal. 600.

dorser becomes the agent of the endorser to enforce payment for his use.³⁹ As the endorser's rights are limited by his agency, the paper thus endorsed is subject to any equity existing between the endorser and the maker.⁴⁰

21. Defences.

Proof that the paper would not have been paid, had it been duly presented, is no defence;⁴¹ nor is the withdrawal of it

39 Young v. Hudson, 99 Mo. 102; Freeman v. Exchange Bank, 87 Ga. 45; Roberts v. Parrish, 17 Or. 583; Battersbee v. Calkins, 128 Mich. 569; Boyd v. Corbitt, 37 Mich. 52; Moore v. Hall, 48 Mich. 143; Coy v. Stiner, 53 Mich. 42; Commercial State Bank v. Rowley, 2 Neb. (Unof.) 645; Smith v. Bayer, 79 Pac. (Or.) 497. A note payable to order, that is endorsed to the order of "John Smith, cashier," vests the bank with a title, whereon it can sue. Hobbs v. Chemical Nat. Bank, 97 Ga. 524; Collins v. Johnson, 16 Ga. 458; Baldwin v. Bank, 1 Wall. (U. S.) 234; First Nat. Bank v. Johnson, 133 Mich. 700; Garton v. Union City Nat. Bank, 34 Mich. 279. An action by a bank on a note containing an allegation that A was its cashier and that the note was endorsed to him is sufficient to show the bank's title. Pratt v. Topeka Bank, 12 Kan. 570; Andrews v. Astor Bank, 2 Duer (N. Y.) 629; Robb v. Ross Co. Bank, 41 Barb. (N. Y.) 586; Bank v. Patchin Bank, 13 N. Y. 309; Farmers' & Mech. Bank v. Troy City Bank, 1 Doug. (Mich.) 457. Parol evidence is admissible to show in what particular bank a person served in whose name negotiable paper was made with the addition of his official title, but not the name of the bank. Baldwin v. Brank, 1 Wall. (U. S.) 234, and cases cited. A bank has no authority to employ counsel and bring suits on notes left for deposit. Crow v. Mechanics & Traders' Bank, 12 La. Ann. 692.

40 Smith v. Bayer, 79 Pac. (Or.) 497; Wilson v. Tolson, 79 Ga. 137; Leary v. Blanchard, 48 Me. 269. The debtor of a bank of which A was cashier transferred a negotiable note in payment of his indebtedness to A by a special endorsement, while the bank also assigned its interest therein to enable A to bring a suit on the note in his own name. The suit was maintained, notwithstanding his accountability to the bank for the proceeds. Furthermore, the endorsement and transfer having been made before the maturity of the note, it was not subject to any defence of which neither A nor the bank had any knowledge at the time of the transfer. White v. Stanley, 29 Ohio St. 423.

41 Capitol State Bank v. Lane, 52 Miss. 677; Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 69; Bank v. Kenan, 76 N. C. 340. "The law does not permit the collecting agent to decide in advance that, because the drawer may have in fact been insolvent, that therefore the endorsee, from pursuit of his rights of recourse, would not have availed. If the collecting agent fails to give his principal and endorsee the benefit of such choice

after the bank's neglect to perform its service.⁴² But an acceptance of the proceeds may be a defence,⁴³ or a renewal note;⁴⁴ or a notice not to make protest should payment be refused.⁴⁵

22. Suit for Negligence After Assignment of Debt.

Can the owner of the paper assign it and still preserve his cause of action against the collector for negligence? Again, if this cannot be done in an ordinary case, can the holder do so when he becomes an owner the second time by re-assignment? In Minnesota the affirmative is maintained.⁴⁶

23. Damages.

A bank that is negligent in collecting is liable in damages.⁴⁷ The amount that may be recovered is the amount actually sustained, which may be the principal and lawful interest thereon.⁴⁸ When the collector is guilty of a nominal breach of duty and no real injury has followed, then only a nominal damage can be recovered.⁴⁹ Of course, the bank's negligence must be proved.⁵⁰

he is liable. The insolvency of the drawee would not necessarily have prevented the collection from the drawer. The insolvent debtor may yet have means to secure or pay the diligent creditor." *Citizen's Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69, 83; *Tyson v. State Bank*, 6 Blackf. (Ind.) 225; *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276.

42 *Branch Bank v. Knox*, 1 Ala. 148.

43 *Hughes v. Neal Loan & Bkg. Co.*, 97 Ga. 383.

44 See *Roanoke Nat. Bank v. Hambrick*, 82 Va. 135.

45 *First Nat. Bank v. St. Charles Sav. Bank*, 37 S. W. (Tex. Civ. App.) 768.

46 *Borup v. Nininger*, 5 Minn. 523.

47 *Steele v. Russell*, 5 Neb. 211; *Commercial Bank v. Hamer*, 7 How. (Miss.) 448, 451; *Capitol State Bank v. Lane*, 52 Miss. 677, 679; *Becker & Co. v. First Nat. Bank*, 107 N. W. (N. Dak.) 968; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320; *Borup v. Nininger*, 5 Minn. 523. The liability of a bank negligently failing to collect a check received for collection is not necessarily the amount, for the owner may secure a part or all of the check in other ways. *Jefferson Co. Sav. Bank v. Hendrix*, 39 So. (Ala.) 295.

48 *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412; *Downer v. Madison Co. Bank*, 7 Hill 648.

49 *Bank of Mobile v. Huggins*, 3 Ala. 206. What facts will go to mitigate damages. See *Locke v. Merchants' Nat. Bank*, 66 Ind. 353.

The recovery of the full amount of the paper turns on the question of probability of collection had proper diligence been shown by the collector in performing the duty. This is a question of fact. When inquiry reveals that faithful action by the collecting bank, as the law requires, would have yielded the desired result, the measure of damage is the full amount of the paper.⁵¹ "In such cases," says the Supreme Court of Nebraska, "it is usually impossible to show with certainty that if due care had been observed, the collection would have been made. The law is not so rigid in its requirements for the protection of the negligent agent. It is only necessary to show a reasonable probability that, with due care, the collection would have resulted. The burden rests on the defendant to show that there was no damage."⁵²

In an action on an endorsed note, check or other instrument whereby, through the bank's negligence, the endorser is discharged, *prima facie* the owner of the paper has been injured to the amount of the face of it.⁵³ This rule is founded on the presumption that the endorser was solvent.⁵⁴ If the fact is otherwise, this may be shown in reducing the damages.⁵⁵ But

50 Crawford v. La. State Bank, 1 Martin (La. N. S.) 214, 219; Bank of Mobile v. Huggins, 3 Ala. 206; Borup v. Nininger, 5 Minn. 523. In every case it is incumbent on the party who wishes to avail himself of the want of notice to prove that he has actually suffered damages by such negligence." Crawford v. La. State Bank, 1 Martin (La. N. S.) 214, 219. The drawee of a bill who contends that there was negligence in presentation must prove loss as a consequence. Bamberger v. Bank, 15 Ky. L. Rep. 361.

51 Hitchcock v. Bank of Susquehanna Bridge, 57 N. Y. App. Div. 458; Bank of Utica v. Smedes, 3 Cow. (N. Y.) 662, affg. 20 Johns. 372; Omaha Nat. Bank v. Kiper, 60 Neb. 33; Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 69; Dern v. Kellogg, 54 Neb. 560, 565; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 328.

52 Dern v. Kellogg, 54 Neb. 560, 565.

53 Nat. Revere Bank v. National Bank, 172 N. Y. 109; Potter v. Merchants' Bank, 28 N. Y. 641.

54 Ibid.

55 Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81; West v. St. Paul Nat. Bank, 54 Minn. 466; Steele v. Russell, 5 Neb. 211. The seller of a consignment of fruit shipped to his order, sent a bank a draft

his embarrassment is no defence.⁵⁶ On the other hand, the solvency of the maker is material, for, if the note can be collected of him, the damages resulting from the discharge of the endorser would be merely nominal.⁵⁷ Furthermore, his solvency may be established by general reputation in the community where he resides within a reasonable time after the maturity of the obligation.⁵⁸

Lastly, a bank is not chargeable with the expense of an unsuccessful action to test an endorser's liability, if not induced by any request or misrepresentation of the bank's officers.⁵⁹

24. Liability of Non-Banker.

A person who is accustomed to receive from a customer drafts for collection, which are deposited with a bank for the same purpose, is liable for the bank's negligence in collecting them.⁶⁰

A merchant who undertakes to collect checks, notes or other drafts for his customers is governed by the same rules as banking institutions.⁶¹ Even though the undertaking be gratuitous, the collector "is responsible for positive neglect in the discharge of his duty." In other words, he must use reasonable care, which must be determined from a review of all the circumstances.⁶²

on the purchaser with a bill of lading attached, which the bank surrendered, taking from him a draft for collection. As he was insolvent, the draft was never paid. The measure of damages for the bank's negligence was the market price of the fruit when the purchaser took possession. People's Nat. Bank v. Brogden, 83 S. W. (Tex.) 1098.

56 Steele v. Russell, 5 Neb. 211.

57 Borup v. Nininger, 5 Minn. 523.

58 West v. St. Paul Nat. Bank, 54 Minn. 466, 469, citing Nininger v. Knox, 8 Minn. 140; Burr v. Willson, 22 Minn. 205, 211; Angell v. Rosenberg, 12 Mich. 241; Bank of Middlebury v. Town of Rutland, 33 Vt. 414; State v. Cochran, 2 Dev. (N. C.) 63.

59 Hitchcock v. Bank, 57 N. Y. App. Div. 458; Downer v. Madison Co. Bank, 6 Hill (N. Y.) 648; Ayrault v. Pacific Bank, 1 Abb. Pr. (N. Y. N. S.) 381.

60 Dyas v. Hansom, 14 Mo. App. 363; Young v. Noble, 2 Dis. (Ohio) 485.

61 Dyas v. Hansom, 14 Mo. App. 363.

62 Young v. Noble, 2 Dis. (Ohio) 485.

CHAPTER XIX.

THE RELATION BETWEEN THE COLLECTING AGENCY, SUB-AGENCY AND DEPOSITOR.

1. Responsibility of an agent for the conduct of a sub-agent.	6. Agent should send proper instructions to sub-agent.
2. How far an agent can relieve itself from responsibility for sub-agent by notice in pass-book.	7. Payment to sub-agent is payment to agent.
3. Effect of agreement between other parties.	8. Duty of agent to inquire into real or seeming negligence of sub-agent.
4. Liability of a bank as a transmitter.	9. Recovery of money paid by one agent to another by mistake.
5. Liability of bank as independent contractor.	10. Rights and liabilities of the several parties in cases of failure.
	11. Liability of merchant acting as collecting agent.

1. Responsibility of an Agent for the Conduct of a Sub-Agent.

A bank with which paper is deposited for collection, payable at a distant place, has implied authority to appoint a sub-agent to make the collection.¹ But the courts have long been divided over the rule of liability that should be applied to an agent for the negligence of a sub-agent who is thus employed. In some states the agent is responsible for the negligence of a sub-agent as fully as if he had been his own.² In other states a collecting

¹ Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 224; National Revere Bank v. National Bank, 172 N. Y. 102; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Planters and Farmers' Nat. Bank v. First Nat. Bank, 75 N. C. 534. A life insurance company sent the renewals on policies to a bank for collection, which it permitted an agent of the company to collect. The bank thereby made him its agent and became responsible for his neglect. Manhattan Life Ins. Co. v. First Nat. Bank, 80 Pac. (Colo.) 467.

² Eufaula Grocery Co. v. Mo. Nat. Bank, 118 Ala. 408; Simpson v. Waldby, 63 Mich. 439; Fort Dearborn Nat. Bank v. Security Bank, 87 Minn. 81, 84; Streissguth v. Bank, 43 Minn. 50; Power v. First Nat. Bank, 6 Mont. 251; Titus v. Mechanics' Nat. Bank, 35 N. J. Law 588; Davey v. Jones, 42 N. J. Law 28; Kirkham v. Bank, 165 N. Y. 132; Naser v. First Nat. Bank, 116 N. Y. 492; Com. Bank v. Red River Valley Bank, 8 N. Dak.

agent has done its full duty in selecting a competent sub-agent, when one is ordinarily required or employed.³

By the former rule the depositor looks simply to the agent for redress if there has been any negligence in collecting; he, in turn, holds the guilty sub-agent, whoever he may happen to be; by the other rule the depositor can hold only the one who is negligent for redress. He may indeed be the agent, or a sub-agent or perhaps two or three may be involved in the common negligence.

2. How Far an Agent Can Relieve Itself from Responsibility for Sub-Agent by Notice in Pass-Book.

In a state wherein a bank is responsible for the conduct of a sub-agent it may, by a notice in a pass-book, absolve itself from the negligence of a sub-agent. Yet it is still liable for negligence in choosing a sub-agent should he prove to be incompe-

382; Reeves v. State Bank, 8 Ohio St. 465; Young v. Noble, 2 Dis. (Ohio) 485; Masich v. Citizens' Bank, 34 La. Ann. 1207; State Nat. Bank v. Thomas Mfg. Co., 17 Tex. Civ. App. 214; Sherman v. Port Huron Engine Co., 8 S. Dak. 343; Bailie v. Augusta Sav. Bank, 95 Ga. 277; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215; Ayrault v. Pacific Bank, 47 N. Y. 570; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276; Farmers' Bank v. Owen, 5 Cranch C. C. (U. S.) 504.

3 East-Haddam Bank v. Scovil, 12 Conn. 303; Anderson v. Alton Nat. Bank, 59 Ill. App. 581; Waterloo Milling Co. v. Kuenster, 158 Ill. 259, affg. 58 Ill. App. 61; Aetna Ins. Co. v. Alton City Bank, 25 Ill. 243; First Nat. Bank v. Bank of Whittier, 77 N. E. (Ill.) 563, 567; Irwin v. Reeves Pulley Co., 20 Ind. App. 101, reviewing many cases; Guelich v. National State Bank, 56 Iowa 434; Bank of Lindsborg v. Ober, 31 Kan. 599; Beach v. Moser, 4 Kan. App. 66, citing many cases; Jackson v. Union Bank, 6 Har. & J. (Md.) 146; Finch v. Karste, 97 Mich. 20; Mechanics' Bank v. Earp, 4 Rawle 384; Wingate v. Mechanics' Bank, 10 Pa. 164; Fabens v. Mercantile Bank, 23 Pick. (Mass.) 330; Lord v. Hingham Nat. Bank, 186 Mass. 161; Citizens' Bank v. Howell, 8 Md. 530; Third Nat. Bank v. Vicksburg Bank, 61 Miss. 112; Daly v. Butchers' & Drov. Bank, 56 Mo. 94; First Nat. Bank v. Sprague, 34 Neb. 318; Bedell v. Harbine Bank, 62 Neb. 339; Hazlett v. Commercial Nat. Bank, 132 Pa. 118; Bank v. Cummings, 89 Tenn. 609; Bank of Louisville v. Bank of Knoxville, 8 Bax. (Tenn.) 101; Stacy v. Dane Co. Bank, 12 Wis. 629; Second Nat. Bank v. Merchants' Nat. Bank, 111 Ky. 930; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464; Planters & Farmers' Nat. Bank, v. First Nat. Bank, 76 N. C. 534; Hum v. Union Bank, 4 Rob. (La.) 109. A collecting bank is liable for the amount

tent. The choice of a sub-agent for collecting a check which is drawn on itself is improper.⁴

3. Effect of Agreement Between Other Parties.

When a paper passes through several agencies before the collection and return of the money, generally they stipulate how the collection shall be made and when and in what manner the proceeds shall be sent. Very often they are returned through exactly the same channel as the paper went; sometimes a different direction is by agreement or order given to them. The agreements effected between the various parties are not binding on the depositor without his real or implied consent.⁵ When they are not, he can change the transit of the check at any time during its outward course and command the proceeds when they have been collected.

The secondary agency, whether consisting of one or more banks, usually receives the paper as agent for collection, and consequently the title thereto does not pass, unless by endorsement or other agreement.⁶ When, however, the paper has been collected, the relation of principal and agent between remitter and collector may be changed in some states into that of debtor and creditor by an extension of the custom prevailing, as we have seen⁷ between remitter and depositor.⁸ To this rule the

of a note collected by a special agent. *First Nat. Bank v. Craig*, 3 Kan. App. 166.

⁴ *Minneapolis Sash Co. v. Metropolitan Bank*, 76 Minn. 136.

⁵ *Naser v. First Nat. Bank*, 116 N. Y. 492, 498. Bonds and an order for the interest thereon were delivered by the owners to a bank for transmission as the agent of the owners to its correspondent bank in New York, where the bonds were payable, for collection. The correspondent thereby became the agent of the owner and liable for any neglect in performing the duty. *Kelley v. Phoenix Nat. Bank*, 17 N. Y. App. Div. 496.

⁶ *Williams v. Jones*, 77 Ala. 294; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; *Commercial Bank v. Marine Bank*, 37 How. Pr. (N. Y.) 432; *Continental Nat. Bank v. Weems*, 69 Tex. 489; *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252; *Commercial Bank v. Armstrong*, 148 U. S. 50; *Richardson v. Continental Nat. Bank*, 36 C. C. A. 315; *Fifth Nat. Bank v. Armstrong*, 40 Fed. 46.

⁷ Chap XVII. §3.

⁸ *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252; *Commercial Bank*

important limitation must be added that the change of relation does not occur whenever there would have been none between the depositor and the primary bank had it made the collection.⁹ In other words the secondary agency can acquire no greater rights over the proceeds than the primary bank could have acquired if performing the entire duty itself. Consequently, if by an agreed form of endorsement or other agreement, a custom of any kind existing between bank and depositor the title to his paper, or the proceeds, were not at any time to pass to the bank, every succeeding agent having knowledge thereof would be bound in the same manner as the original bank.

4. Liability of a Bank as a "Transmitter."

Sometimes paper is deposited in a bank to be *transmitted* by it to another for collection.¹⁰ In these cases the first bank is not the agent of the depositor, but the bank to which the paper is sent. The only duty, therefore, required of the first bank is to exercise proper care in selecting an agent and in sending the paper.

The distinction between the services performed by the first or sending bank and the ordinary bank in which the paper is deposited for collection is very shadowy and surely will give birth to legal dispute. One cannot help thinking that the object in drawing this distinction is to relieve the first bank of liability for the misconduct of the other. In other words, the distinction is intended to soften the hardship of the rule that no agent is responsible for the misconduct of sub-agents wherever this rule prevails.¹¹

v. Armstrong, 148 U. S. 50; State v. Southern Bank, 33 La. Ann. 957; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553; People v. City Bank, 93 N. Y. 582; First Nat. Bank v. Davis, 114 N. C. 343; Romanski v. Thompson, 11 So. (Miss.) 828.

9 See Chap. XVII. §10.

10 Naser v. First Nat. Bank, 116 N. Y. 492; Schumacher v. Trent, 18 Tex. Civ. App. 17. See next section.

11 Schumacher v. Trent, 18 Tex. Civ. App. 17.

5. Liability of Bank as Independent Contractor.

A bank may receive a claim for collection as an independent contractor or collector, like a collecting claim agency. When thus employed the owner of the check, draft or other claim has no recourse to any sub-agent whom the contractor may employ. His remedy for any loss is solely against the contractor.¹² Thus, a draft was endorsed by the payee "for deposit" and deposited in a bank, which endorsed it "for collection" and sent it to another bank for that purpose. As between the depositor and the first bank it was regarded by the court "as the owner." Consequently the depositor could not maintain a suit against the second bank for alleged negligence pertaining to the collection.¹³

While there can be no question about the soundness of the principle applied in this case, one may question the interpretation of the facts. The draft was endorsed "for deposit," which in most cases has the effect of retaining the depositor's ownership. The bank, it is true, credited the draft, but no advance was made. How, then, did it become the owner? Furthermore, was the crediting anything more than provisional? This surely is the doctrine of some of the Pennsylvania cases.

Concerning the ownership the court further said: "So long as the amount remained in [the depositor's] account to his credit, the bank was the owner and the title did not revert to him until the draft was returned unpaid, and charged back to the debit side of his account."

6. Agent Should Send Proper Instructions to Sub-Agent.

The agent should convey such instructions to the sub-agent as are needful for intelligent action.¹⁴ Should it then prove to

¹² Morris v. First Nat. Bank, 201 Pa. 160; Siner v. Stearne, 155 Pa. 62; Morgan v. Tener, 83 Pa. 85; Bradstreet v. Everson, 72 Pa. 124; Lord v. Hingham Nat. Bank, 186 Mass. 161; Echarte v. Clark, 2 Edm. Sel. Cases 445; Hoover v. Wise, 91 U. S. 308. See Finch v. Karste, 97 Mich. 20.

¹³ Morris v. First Nat. Bank, 201 Pa. 160.

¹⁴ Borup v. Nininger, 5 Minn. 523.

be negligent, by the first rule it would be liable to the agent, by the second to the depositor.¹⁵

7. Payment to Sub-Agent is Payment to Agent.

Payment to an authorized sub-agent is payment to the agent,¹⁶ who becomes a debtor to the depositor.¹⁷ Again, like an agent, he can receive only money in payment.¹⁸ An agent may indeed fail to receive his money, not from any defect in ownership, but through inability to trace its existence into the possession of a party from whom it can be justly demanded.

8. Duty of Agent to Inquire Into Real or Seeming Negligence of Sub-Agent.

Though a bank may select a proper sub-agent and thereby relieve itself, by the second rule, of further responsibility, yet its duty is not wholly completed. There are occasions on which it must do something more. Thus when a note is given to a sub-agent to collect and nothing is heard from it after the maturity of the obligation, or for a considerable period, the agent should make inquiry of its sub-agent concerning the business. And should it neglect to do this it would be responsible for the consequences to the owner of the note.¹⁹ Furthermore, should an agent send other notes to the same sub-agent after its failure to make a due report on the first note this would be clearly negligence.²⁰

9. Recovery of Money Paid by One Agent to Another by Mistake.

When money is paid by one agent to another through mistake, which has not been forwarded by the latter to the principal, it may be recovered, provided its repayment would leave the payee in no worse position than it was before its receipt.²¹

¹⁵ First Nat. Bank v. First Nat. Bank, 4 Dill. (U. S.) 290.

¹⁶ Reeves v. State Bank, 8 Ohio 465.

¹⁷ O'Leary v. Abeles, 68 Ark. 259; Jones v. Kilbreth, 49 Ohio St. 401; Bank v. Union Trust Co., 149 Ill. 343.

¹⁸ Ibid.

¹⁹ Second Nat. Bank v. Merchants' Nat. Bank, 111 Ky. 930.

²⁰ Ibid.

²¹ National Bank v. American Exchange Bank, 151 Mo. 320, 332; Na-

10. Rights and Liabilities of the Several Parties in Cases of Failure.

Most of the difficulties in collecting happen from the breaking of the chain by the insolvency of one or more of the members. A depositor may fail owing the first bank, which then stretches out hands to grasp everything within its reach. Or, the situation may be reversed and the final bank, or an intermediary in the chain, may break. In every case the creditors of the failing bank seek to hold what they have and get, if possible, still more. What principles guide the several parties on these occasions? First, no agreement between any two or more bind others who are not parties thereto. Second, the agreements between the agent or sub-agent ordinarily do not affect the depositor, unless they are known by him and receive his open or implied assent. Third, as soon as an agent or sub-agent fails his authority to act is ended; he cannot receive anything, and if he does, it is held in trust as if he had made no collection. Fourth, advances made in good faith on proper authority by the failed agent are a valid claim on the proceeds in its possession. Fifth, when the paper in process of collection belongs to the depositor and it is collected by the depository either alone or by other assistance as its agents, the proceeds belong to the depositor, and his rights thereto are not affected by the failure of any one of the collectors.

If the broken link in the chain is the first bank and the second one has funds credited thereto, can a depositor of the failed bank claim those funds, or do they belong to the receiver for general distribution? Very often there are mutual accounts between the two banks, and the fund thus credited is composed of several collections, while the money itself has gone into the bank's general fund. If the collection consists of one or more items that belonged to a depositor, and the money collected is still in its possession, he can rightfully claim it;²² but if the money has become mingled in the ordinary

tional Park Bank v. Seaboard Bank, 114 N. Y. 28; Herrick v. Gallagher, 60 Barb. (N. Y.) 566; La Farge v. Kneeland, 7 Cow. (N. Y.) 456, 460; Mowatt v. McLelan, 1 Wend. (N. Y.) 173; Cox v. Prentice, 3 Maule & Sel. (Eng.) 348; Buller v. Harrison, 1 Cowp. (Eng.) 568.

²² See Chap. XVII. §8.

course of business without any intention of wronging any one, no depositor has any preference thereto over any other.²³

11. Liability of Merchant Acting as Collecting Agent.

Sometimes merchants have accounts with their customers, receiving deposits, checks, and other instruments and collecting them; in short, acting for them either gratuitously or otherwise, very much like private bankers. When they thus act they are governed by the same laws as other bankers in making collections; and if they appoint a sub-agent to complete a collection are responsible for his conduct in those states where a bank is subject to the same liability.²⁴

23 Reeves v. State Bank, 8 Ohio St. 465.

24 Dyas v. Hanson, 14 Mo. App. 363.

CHAPTER XX.

LEADING PRINCIPLES CONCERNING THE PAYMENT OF DEPOSITS.

1. Order for payment must be written.
2. Definition of check.
3. Is a check an order or a bill of exchange?
4. Care required in preparing a check.
5. Dating a check.
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34. Recovery of payment made by mistake. 35. An agent authorized to deposit has no implied authority to draw. 36. Authority of a guardian to draw. 37. Sending checks or money by mail. 38. Revocation. <ul style="list-style-type: none"> a. by death. b. By drawer's order. c. Cashier cannot revoke payment of his check. d. Nor maker under some conditions. 39. Check cannot be presented after drawee's failure. 40. Conversion of check by former owner. 41. Credits by bank without money to pay are worthless. 42. Consequences of bank's disregard of depositor's order to pay. Damages. 43. Payment of lost and duplicate checks.	44. Recovery from depository of proceeds of check fraudulently obtained. 45. Payment to conflicting claimants. Interpleader. <ul style="list-style-type: none"> a. Reason for interpleader. b. When it can be brought. c. Allegations. d. Changes in the law. e. Nature of the contest. f. Interpleader where the assignment rule prevails. g. Expense of proceedings. 46. Payment through clearing-house. <ul style="list-style-type: none"> a. Nature. b. Clearing for non-members. c. Rules and usages. d. Consequences of non-enforcement. e. Rule regulating endorsements. f. Failures. g. Settlements. h. Damages for payments by mistake. i. Note clearings.
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1. Order for Payment Must be Written.

A bank may pay money or transfer it from one account to another on the oral order of the depositor,¹ but is under no obligation to the payee to act on such direction.² Universally a written order is required.³ Like any other this is not valid

¹ *McEwen v. Davis*, 39 Ind. 109; *Ellis v. First Nat. Bank*, 22 R. I. 565, 572; *Ridgely Nat. Bank v. Patton*, 100 Ill. 479; *Risley v. Phenix Bank*, 83 N. Y. 318. See *First Nat. Bank v. Hall*, 119 Ala. 64, 68; *Neff v. Greene Co. Nat. Bank*, 89 Mo. 581. "A depositor may transfer his money by a written instrument, and I know of nothing to prevent his doing so by a verbal direction, except this: That the bank may require some written evidence of this order to transfer, and I believe there is no necessity for giving a written instrument, except for the purpose of evidence." *Watts v. Christie*, 11 Beav. (Eng.) 546, 551.

² *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319, 329.

³ *First Nat. Bank v. Stapf*, 165 Ind. 162; *McEwen v. Davis*, 39 Ind. 109; *Koelzer v. First Nat. Bank*, 125 Wis. 595. The omission of the abbrevia-

until delivery,⁴ and a variation between the date and time of delivery may be shown when the fact is important.⁵ Unlike debtors generally, a bank is not obliged to seek its creditors to make payment. They must come to the bank. Its business could be conducted in no other way.⁶

2. Definition of Check.

By the Negotiable Instruments Law "a check is a bill of exchange drawn on a bank, payable on demand."⁷ It is a written contract containing the conclusions and embodiment of the negotiations between the parties and cannot be varied by parol evidence.⁸ Memoranda written on the margin or in the body of a check for the sole use of the depositor do not affect its validity; nor the rights and duties of the other parties.⁹ It is negotiable,¹⁰ nor does the drawer's contrary intention affect

tion, Jr., at the end of a depositor's name does not justify the drawee bank in refusing to pay his check. *Ill. State Bank v. Batty*, 5 Ill. 200. An order payable to a person named "for account of" another is a check. *Ridgely Nat. Bank v. Patton*, 100 Ill. 479.

⁴ *Cowing v. Altman*, 71 N. Y. 435.

⁵ *Ibid.*

⁶ *McBee v. Purcell Nat. Bank*, 1 Indian Terr. 288, 294; *Branch v. Dawson*, 33 Minn. 399, 401; *Girard Bank v. Bank of Penn Township*, 39 Pa. 92.

⁷ New York Law §321. *Espy v. Bank*, 18 Wall. (U. S.) 604, 620; *Roberts v. Corbin*, 26 Iowa 315; *Planters' Bank v. Keesee*, 7 Heisk. (Tenn.) 200; *MERCHANTS' NAT. BANK V. RITZINGER*, 118 Ill. 484; *Woodruff v. Merchants' Bank*, 25 Wend. (N. Y.) 673; *Harrison v. Nicollet Nat. Bank*, 41 Minn. 488. A bank check differs from an ordinary bill of exchange in the following particulars: "First, it is drawn on a bank or banker, and is payable immediately on presentment, without any days of grace; second, it is payable immediately on presentment, and no acceptance, as distinct from payment, is required; and third, by its terms it is supposed to be drawn upon a previous deposit of funds, and is an absolute appropriation of so much money in the hands of the banker to the holder of the check, to remain there until called for, and cannot, after notice, be withdrawn by the drawer." *Guffy, J., Weiand v. State Nat. Bank*, 112 Ky. 310, 314.

⁸ *American Emigrant Co. v. Clark*, 47 Iowa 671; *Aurora Nat. Bank v. Dils*, 18 Ind. App. 319, 328. See §13.

⁹ *State Nat. Bank v. Reilly*, 124 Ill. 464; *Dykers v. Leather Manuf. Bank*, 11 Paige (N. Y.) 612.

¹⁰ *Keene v. Beard*, 8 C. B. (N. S.) 372; *Murray v. Judah*, 6 Cow. (N.

its negotiability.¹¹ Often it is payable to order and when thus drawn it is negotiable by endorsement.¹² It must be for the payment of money,¹³ which is supposed to be in the possession of a bank or banker.¹⁴ Possessing negotiability, it is presumptively founded on a valuable consideration.¹⁵ Lastly, the order must be on a bank engaged in business. A check, therefore, on a bank that has failed, or is in liquidation, is merely evidence of an assignment by the maker of his deposit.¹⁶

3. Is a Check an Order or a Bill of Exchange?

Whether the usual bank check is a bill of exchange, and consequently when presented for payment and is not paid must be treated like a bill, or is an order payable immediately on presentation without grace, is a question that has long divided the judicial world. A hundred years ago the Supreme Court of New York decided that a bank check was in form and nature like a bill of exchange with all the legal qualities attaching thereto, which the pleader could thus describe in his declaration.¹⁷ This opinion had been maintained in that state and also

Y.) 484; Smith v. Janes, 20 Wend. (N. Y.) 192; Cecil Bank v. Heald, 25 Md. 562; Ellis v. Wheeler, 3 Pick. (Mass.) 18; Stewart v. Smith, 17 Ohio St. 82; Exchange Bank v. Quebec Bank, Mont. L. Rep. 10.

11 American Emigrant Co. v. Clark, 47 Iowa 671.

12 Barbour v. Bayon, 5 La. Ann. 304; Willets v. Phoenix Bank, 2 Duer (N. Y. Super. Ct.) 121.

13 Bank of Mobile v. Brown, 42 Ala. 108. See Little v. Phenix Bank, 2 Hill (N. Y.) 425; Lieber v. Goodrich, 5 Cow. (N. Y.) 186; Thompson v. Sloan, 22 Wend. (N. Y.) 73 and cases cited in Young v. Scott, 5 Ala. 475 and Carlisle v. Davis, 7 Ala. 42.

14 National Bank of America v. Indiana Bkg. Co. 114 Ill. 483; Deener v. Brown, 1 McArthur (D. C.) 350; Bowen v. Newell, 13 N. Y. 290; Northwestern Coal Co. v. Bowman, 69 Iowa 150, 152; Hawley v. Jette, 10 Or. 31; Gibsonburg Bkg. Co. v. Wakeman Bank Co., 20 Ohio C. C. 591; Bull v. First Nat. Bank, 123 U. S. 105.

15 Columbia Incandescent Lamp Co. v. Am. Electrical Manuf. Co., 64 Mo. App. 115.

16 Harmanson v. Bain, 1 Hughes (U. S.) 188.

17 Cruger v. Armstrong, 3 Johns. Cases (N. Y.) 5; Risley v. Phoenix Bank, 83 N. Y. 318; Henshaw v. Root, 60 Ind. 220; Barnet v. Smith, 30 N. H. 256; Sutcliffe v. McDowell, 2 Nott & McC. (S. C.) 251; Planters' Bank

in many others as the common law until the adoption of the Negotiable Instruments Law. Nevertheless, the courts in the larger number of states have not regarded an ordinary bank check as a bill with the legal qualities it possesses.¹⁸ From time to time they have sought to differentiate the two instruments. In one of the best considered cases on the subject the distinguishing characteristics are thus set forth: A check is drawn on a bank or banker and is payable immediately without days of grace; it is payable on presentment and no acceptance distinct from payment is required; it is supposed to be drawn on a previous deposit; it is taken free from all equities even though taken some days after date; it is never treated as overdue, as it is always payable on presentation and demand. On the other hand, a bill of exchange taken after the date of payment or when overdue is subject to all the equities that attached thereto between the original parties.¹⁹

All these distinctions have been dissolved by judicial action. Fifty years ago a judge wrote: "At this day the only distin-

v. Merritt, 7 Heisk. (Tenn.) 177; Purcell v. Allemong, 22 Gratt. (Va.) 739.

¹⁸ Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604; Bull v. First Nat. Bank, 123 U. S. 105; Harrison v. Wright, 100 Ind. 515; Roberts v. Corbin, 26 Iowa 315; Lester v. Given, 8 Bush (Ky.) 357; Bullard v. Randall, 1 Gray (Mass.) 605; Exchange Bank v. Sutton Bank, 78 Md. 577; Wood River Bank v. First Nat. Bank, 36 Neb. 744; Morrison v. Bailey, 5 Ohio St. 13; Champion v. Gordon, 70 Pa. 474; Fletcher v. Thompson, 55 N. H. 308; Barbour v. Bayon, 5 La. Ann. 304. "A regular bill of exchange may be in form similar to a bank check so that it may sometimes be difficult, from their form, to distinguish between the two classes of instruments. But when the instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party named of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check rather than as a bill of exchange, and the liability of parties thereto is to be determined accordingly. If the instrument designates a future day for its payment, it is, according to the weight of authorities, to be deemed a bill of exchange, when, without such designation, it would be treated as a check." Field, J. Bull v. First Nat. Bank, 123 U. S. 105, 110.

¹⁹ Lester v. Given, 8 Bush (Ky.) 357. See David v. Merchants' Nat. Bank, 20 Ky. L. Rep. 263.

guishing difference between a general bill of exchange and a check is, that a check must be drawn upon a bank, or upon a banker, or one acting as a banker."²⁰

The similarity between the two is the reason why the courts have had such a hard time in answering the question. Nevertheless, the question has been, until recently, very important because, in the states where the instrument was regarded as a bill, the holder was obliged to follow the law relating to bills in demanding payment and giving notice in order to hold the drawer; otherwise he lost his rights and remedy against him. Since the abolition of the days of grace in so many states, with the certainty of their speedy disappearance in all, the question has shrunk into insignificance.

By nearly all the authorities a check that is to be paid at the end of a specified period is a bill,²¹ but whether a check that is to be paid at a specified date is also a bill is a close question. Perhaps the better opinion is that it is a check.²²

It may be added, on quitting the subject, that the courts have doubtless been led to take advantage of the vague uncertain difference between the two instruments to label a check the one thing or the other as would best serve the ultimate purpose of rendering more perfect justice in the particular controversy.

4. Care Required in Preparing a Check.

As a bank is responsible to the drawer for any mistake in paying the check he actually drew, the drawer must also exer-

²⁰ Westminster Bank v. Wheaton, 4 R. I. 30, 37.

²¹ Minturn v. Fisher, 4 Cal. 35; Bradley v. Delaplaine, 5 Har. (Del.) 305; Work v. Tatman, 2 Houst. (Del.) 304; Henderson v. Pope, 39 Ga. 361; Georgia Nat. Bank v. Henderson, 46 Ga. 487; Culter v. Reynolds, 64 Ill. 321; Harrison v. Nicollet Nat. Bank, 41 Minn. 488; Murray v. Judah, 6 Cow. (N. Y.) 484; Bowen v. Newell, 8 N. Y. 190 and 13 N. Y. 290; Woodruff v. Merchants' Bank, 25 Wend. (N. Y.) 673 and 6 Hill 174; Hawley v. Jette, 10 Or. 31; Ivory v. Bank, 36 Mo. 475; Morrison v. Bailey, 5 Ohio St. 13; Brown v. Lusk, 4 Yerg. (Tenn.) 210. But in an action on such a check against the drawer it is not necessary to allege that notice of its dishonor for non-payment was served on the defendant to entitle the plaintiff to judgment thereon. Work v. Tatman, 2 Houst. (Del.) 304.

²² Champion v. Gordon, 70 Pa. 474; Andrew v. Blachly, 11 Ohio St. 89; In matter of Brown, 2 Story (U. S.) 502.

cise care in its preparation so that alterations cannot be easily made.²³ For, if he is negligent in this regard, so that dates and amounts can be easily changed, he can blame no one but himself should some one take advantage of his carelessness to defraud him.²⁴ But the maker is not required to provide against a possible alteration.²⁵

In like manner a person who signs checks in blank and puts them in his agent's possession to be filled out and used in his business will be responsible for a check stolen through the agent's negligence, filled out and presented for payment.²⁶

5. Dating a Check.

A check should be dated; if it is not, and contains a blank to be thus filled, the holder may insert the date of its delivery.²⁷ A check may be dated on Sunday,²⁸ but cannot be paid on that day without peril.²⁹ An alteration of the date, either accelerating³⁰ or deferring³¹ the time without the drawer's consent vitiates the instrument, and, if paid by the bank, it must bear the loss. A post dated check is valid, but it ought not to be paid before the day-date.³² If it is, the depositor can recover his money.³³ Such a check is transferrable like any other.³⁴

²³ Young v. Grote, 4 Bing. (Eng.) 253; Robarts v. Tucker, 16 Q. B. 560; Greenfield Sav. Bank v. Stowell, 123 Mass. 196; Burnet Woods B. & Sav. Co. v. German Nat. Bank, 4 Ohio Dec. 290. See Chap. XXIV. §7.

²⁴ Chap. XXIV. §7.

²⁵ Crittent v. Chemical Nat. Bank, 171 N. Y. 219; Belknap v. National Bank, 100 Mass. 376; Societe Generale v. Metropolitan Bank, 27 Law Times (Eng. N. S.) 849.

²⁶ Snodgrass v. Sweetser, 15 Ind. App. 682.

²⁷ Barber v. Aregood, 1 Pa. Week. Notes 403; Hepler v. Mt. Carmel Sav. Bank, 97 Pa. 420; Bank of Pittsburgh v. Neal, 22 How. (U. S.) 96.

²⁸ Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304, affd. 13 Wend. 133; Salter v. Burt, 20 Wend. 205; Beitenman's Appeal, 55 Pa. 183; Commonwealth v. Kendig, 2 Pa. 448; McCauley v. Phipps, 1 Chester (Pa.) 495.

²⁹ Ibid.

³⁰ Crawford v. West Side Bank, 100 N. Y. 50.

³¹ Wood v. Steele, 6 Wall. (U. S.) 80; Vance v. Lowther, L. R. 1. Ex. Div. (Eng.) 176.

³² Frazier v. Trow's Printing Co., 90 N. Y. 678, affg. 24 Hun 281.

³³ Godin v. Bank, 6 Duer (N. Y.) 76.

³⁴ Mayer v. Mode, 14 Hun (N. Y.) 155.

6. Signing for Another. Legal Capacity of Signers.

In writing his signature the drawer may use a pencil;³⁵ to a mark, an attest should be added. If using a printed signature, as it does not prove itself, the fact of its adoption by the user must be shown.³⁶

(a.) The president, treasurer or other officer of a corporation is not authorized by virtue of his office to sign a check; but only by charter, statute, or usage.³⁷ In executing the company's check the officer authorized to do so should sign its name, and then add his own; but the shorter method of signing his own and adding the official title has become very common. Once a narrow construction was given to such a signature; that it was simply his own while his title was merely a *descriptio personæ*.³⁸ Now, such a signature is presumed to be that of the corporation he represents, and if any doubt exists concern-

35 Brown v. Butchers' & Drov. Bank, 6 Hill (N. Y.) 443; Reed v. Roark, 14 Tex. 329; Closson v. Stearns, 4 Vt. 11; McDowell v. Chambers, 1 Strob. Eq. (S. C.) 347; Drefahl v. Security Sav. Bank, 107 N. W. (Iowa) 179; Geary v. Physic, 5 B. & C. (Eng.) 234.

36 Pennington v. Baehr, 48 Cal. 565; Brown v. Butchers' & Drov. Bank, 6 Hill (N. Y.) 443.

37 Fulton Bank v. New York & Sharon Canal Co., 4 Paige (N. Y.) 127, 134; Mahony v. East Holyford Mining Co., 33 Law Times (N. S. Eng.) 383; Serrell v. Derbyshire R., 9 C. B. (Eng.) 811; First Nat. Bank v. G. V. B. Mining Co., 89 Fed. 439; Millward-Cliff Cracker Co.'s Estate, 161 Pa. 157, 164. A check drawn by the treasurer of a corporation without a formal order of the directors, as required by the by-laws and endorsed by the president, is good in the possession of a person who is ignorant of them, especially if the president has deposited to the corporation's credit an equal sum of his own money, which it has appropriated to other purposes. Wayne Title & Trust Co. v. Schuylkill Electric R., 191 Pa. 90. Checks payable to a corporation were endorsed in its name by C., collected and the proceeds were paid over to him. The corporation was estopped from denying C's authority. Craig Medicine Co. v. Merchants' Bank, 59 Hun (N. Y.) 561. A corporation kept two accounts with a bank and left directions with it how the checks were to be signed authorizing payment. The checks drawn on one account were to be signed by the secretary; on the other by the president and secretary. These directions were well understood and the bank was liable for disregarding them. Shoe Lasting Co. v. Western Nat. Bank, 70 N. Y. App. Div. 588.

38 Metcalf v. Williams, 104 U. S. 93, 98; Anderton v. Shoup, 17 Ohio St. 125; Barclay v. Pursley, 110 Pa. 13.

ing its representative character after an examination of the entire instrument, the ambiguity by some courts may be dissipated by other proper evidence.³⁹

By the Negotiable Instruments Law, "When the instrument contains, or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." This provision has not changed the common law rule above given.⁴⁰

(b.) Does the same rule apply to the signature of a check given by an individual, to which the title of his office—sheriff, administrator, clerk and the like—is added? Often, these words have been regarded as *descriptio personæ*;⁴¹ in all cases the truth may be shown.⁴² The tendency is to regard such a deposit as fiduciary, and therefore a bank is not justified in applying it to discharge the depositor's individual indebtedness. But the courts on several occasions have decided otherwise and sustained the action of banks that have made such an application of them.

(c.) A bank is protected in paying money on the check of

³⁹ Carpenter v. Farnsworth, 106 Mass. 561; Fuller v. Hooper, 3 Gray (Mass.) 334, 341; Bank v. Hooper, 5 Gray 567; Slawson v. Loring, 5 Allen (Mass.) 340, 343; Metcalf v. Williams, 104 U. S. 93; Kean v. Davis, 21 N. J. Law 683. But see First Nat. Bank v. Wallis, 150 N. Y. 455.

⁴⁰ Megowan v. Peterson, 173 N. Y. 1.

⁴¹ Comfort v. Patterson, 2 Lea (Tenn.) 670; Miller v. Receiver of Franklin Bank, 1 Paige (N. Y.) 444. A deposit made in the name of W. P. S., Surrogate, can be drawn by his administrator. Scudder v. Trenton Sav. Fund Society, 58 N. J. Eq. 154. "If the addendum implied a trust, it would not defeat the right of the personal representative of the depositor to withdraw the deposit. The trust which inhered in the depositor, upon his death, passed to his personal representative who would be bound to administer all the assets of the deceased as trustee of whatever kind, and to administer the trust with which the assets are charged." Ibid.

⁴² See Chap. XIII. §20f.

an attorney, who has such an account for another, knowing nothing of his intended misappropriation of the money.⁴³

(d.) A depositor can append his name with a rubber stamp. And if he uses it without the bank's knowledge, the bank is not relieved from liability from paying checks thus drawn by a person who has wrongfully obtained possession of the stamp.⁴⁴ But if the depositor has not taken proper precaution to prevent an unlawful use, he cannot throw the loss arising from his own primary negligence on the bank.⁴⁵

7. Minors.

Sometimes deposits are made in the names of, and for the benefit of minors, and questions have arisen concerning the authority of persons to withdraw them. By the common law such a deposit, even though made by a minor's father, cannot be withdrawn by him.⁴⁶ But if made by the minor himself the bank is estopped from questioning his authority to draw it out.⁴⁷ In Massachusetts, by statute, a deposit in a minor's name may, at the direction of the trustees or committee of investment, be paid to him, or to the person making the deposit.⁴⁸ A later endorser would be responsible for a minor's act as drawer or endorser.⁴⁹ Of course, a trust may be made for the benefit of a minor. If a deposit thus held is drawn out by the

43 Penn Title & Trust Co. v. Meyer, 201 Pa. 299. A bank can pay checks to A, who opens an account as "A, attorney for B," without liability to B. Pa. Title & Trust Co. v. Real Estate Loan & Trust Co., 50 At. (Pa.) 998.

44 Robb v. Pennsylvania Co., 186 Pa. 456, affg. 3 Pa. Super. 254. See Mackintosh v. Eliot Nat. Bank, 123 Mass. 393. See §14d.

45 Ibid.

46 See Daniel on Neg. Inst. p. 643. See §36.

47 See Miles v. Boyden, 3 Pick. (Mass.) 213.

48 Pub. Stat. Ch. 116, §29. For construction of this statute, see Dickinson v. Leominster Sav. Bank, 152 Mass. 49. In Ky. by a recent statute a bank is authorized to pay minors' checks. Stat. 1903, §591, p. 360. For statutes on this subject in other states, see 21 Bkg. Law J. 809. In Arizona married women and minors may in their own right make and draw deposits and dividends. Rev. Stat. 1901, §§832.

49 Burrill v. Smith, 7 Pick. (Mass.) 291, 294. 1 Dan. on Neg. Inst. §§226, 675.

wrong person and the minor's mother afterwards assents thereto, or ratifies the act, the bank is no longer liable.⁵⁰

8. Insane and Drunken Signers.

A stricter rule is applied for the protection of the insane.⁵¹ Their checks should not be paid; and in some states a bank is not protected in doing so, even though not suspecting the maker's condition. The more general rule protects a bank that pays without any knowledge or suspicion of the maker's condition; but surely a bank ought not to pay a check of one whose incapacity has been declared by a board or commission of lunacy.

What condition or degree of drunkenness will relieve a signer from the consequences of his act? In a recent contention involving the inquiry the court declared that the signer remained bound "even though under the influence of liquor . . . unless he was unable to appreciate the nature of his act."⁵²

9. Joint Signers.

(a.) There are many persons who conduct business jointly, but all are not required to sign the checks given. Thus a co-executor can give a check,⁵³ likewise a co-administrator,⁵⁴ but a different rule applies to technical trustees;⁵⁵ each must sign.

50 *Eagle & Phenix Mfg. Co. v. Belcher*, 89 Ga. 218.

51 *American Trust & Bkg. Co. v. Boone*, 102 Ga. 202. *Riley v. Albany Sav. Bank*, 36 Hun 513, affd. 103 N. Y. 669; *Howard v. Digby*, 2 Cl. & Fin. (Eng.) 634; *Drew v. Nunn*, L. R. 4 Q. B. Div. 661.

52 *Drefahl v. Security Sav. Bank*, 107 N. W. (Iowa) 178. In Texas a husband deposited his wife's money in her name, stating that he would check it out, as he had a right to do by statute, giving him control of her property. The fact that the bank knew he was a drunkard and improvident in the use of money did not impose any duty on the institution to ensure the application of the money drawn out for her use. *Coleman v First Nat. Bank*, 17 Tex. Civ. App. 132.

53 *Stone v. Union Sav. Bank*, 13 R. I. 25; *Ex parte Rigby*, 19 Ves. Jr. (Eng.) 462; *Can v. Read*, 3 Atk. (Eng.) 695. See *Allen v. Dundas*, 3 Term (Eng.) 125 and opinion of Hare, Pres. J., in *De Haven v. Williams*, 80 Pa. 480. And if the signature of a co-executor is forged by the other and payment is made to the payer, the bank is protected. *Stone v. Union Sav. Bank*, 13 R. I. 25. See *Barry v. Lambert*, 98 N. Y. 300, 308.

54 *Pond v. Underwood*, 2 Ld. Ray. (Eng.) 1210; *Prosser v. Wagner*, 1 C. B. (N. S. Eng.) 289; *Clough v. Bond*, 3 M. & C. (Eng.) 490.

(b.) A partner can sign for a partnership and draw only on the check of the partnership.⁵⁶ The partnership funds must be kept in the partnership's name. When, however, a partner dies, as his death works a dissolution of the partnership, the survivor can draw out the partnership fund, either in the partnership name, or in his own, as surviving partner.⁵⁷ But a bank has no right to apply the deposits made by a surviving partner to a partnership debt created before its dissolution.⁵⁸ Again, a retired partner may be liable on a check given after the dissolution of his firm to one who is ignorant of his retirement.⁵⁹

(c.) Lastly, when money is deposited in a bank on the joint account of several persons who are not partners in trade, all must unite in withdrawing the deposit.⁶⁰

10. Checks of Husband and Wife.

To whom and how deposits shall be paid belonging to a married woman, or to a husband and wife, depends often on positive law. If she deposits money in her own name and the bank does not know that she is a married woman, it can safely pay her on her check.⁶¹ Even though the money belongs to her

55 Stone v. Marsh, Ry. & M. (Eng.) 364.

56 Coote v. Bank, 3 Cranch C. C. (U. S.) 50; Forster v. Mackreth, L. R. 2 Ex. (Eng.) 163; Kirk v. Blurton, 9 M. & W. (Eng.) 284; Emly v. Lye, 15 East (Eng.) 7; Nicholson v. Ricketts, 29 L. J. (Q. B.) 55.

57 Commercial Nat. Bank v. Proctor, 98 Ill. 558; Backhouse v. Charlton, L. R. 8 Ch. Div. (Eng.) 444.

58 Hodgkin v. People's Nat. Bank, 125 N. C. 503, s. c. 124 N. C. 540. See Simpson v. Ingham, 2 B. & C. (Eng.) 65.

59 Rose v. Coffield, 53 Md. 18, 26, the court citing Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183; National Bank v. Norton, 1 Hill (N. Y.) 572. See Wardwell v. Haight, 2 Barb. (N. Y.) 549, and Clapp v. Rodgers, 12 N. Y. 283.

60 Innes v. Stephenson, 1 Moody & Rob. (Eng.) 145. See Other v. Iveson, 3 Drewry (Eng.) 177. When certificates of deposit are made payable to A and B the law presumes they own them jointly. Armstrong v. Johnson, 93 Mo. App. 492; State v. Brady, 53 Mo. App. 202; Tisdale v. Maxwell, 58 Ala. 40.

61 Chaps XXI. §11 and XXII. §26f. Dacy v. N. Y. Chemical Mfg. Co., 2 Hall (N. Y.) 550.

husband, who has entrusted her with its custody and disposition, which is abused, it may be safely paid by the bank so long as nothing is known about her husband's instructions.

If a married woman's personal property belongs to her husband, as the law was formerly, a bank knowing of her coverture would not be justified in permitting her to withdraw it. Difficulties do arise in determining a husband's authority to withdraw his wife's deposits. These have been considered elsewhere.⁶²

Deposits are often made in the name of one's wife for various reasons and are subsequently claimed by him. Whether he is entitled to them or not is generally a question of fact that must be ascertained by proper inquiry.⁶³

11. Checks Must Have a Payee.

To be valid a check must have a payee.⁶⁴ A writing, therefore, in the following words: "D. & Co., bankers, Pay to order of, on sight two hundred dollars in current funds," is lacking this essential and is not a check.⁶⁵ But a check made payable to an indefinite or obscure thing, for example, "to the order

62 Chap. XXI. §§ 1 b, c.

63 *Tobias v. Josiah Morris & Co.*, 126 Ala. 535. A depositor who having authorized his wife to draw some checks takes advantage of the instruction to draw other checks, is nevertheless bound by her action after seeing the state of his account from time to time and the checks and making no objection. *Neal v. First Nat. Bank*, 26 Ind. App. 503. A married woman's endorsement on a check payable to her, to pay her husband or order and credit her account with the amount, is only an order authorizing him to collect her money and deposit it to her credit, especially under a statute requiring full authority in writing from her to her husband to sell or dispose of her property. *Stone v. Gilliam Ex. Nat. Bank*, 81 Mo. App. 9. The deposit of a husband in a savings bank, though standing in his wife's name, may be taken by his judgment creditor if the fact of his ownership is clearly proved. *Albro Co. v. Fountain*, 15 N. Y. App. Div. 351.

64 *McIntosh v. Lytle*, 26 Minn. 336. An instrument without negotiable words executed by a bank cashier stating that a person on a prior date named had a specified sum on deposit to his credit is no kind of bank obligation; but merely evidentiary. *Modern Woodmen v. Union Nat. Bank*, 47 C. C. A. 667.

65 *McIntosh v. Lytle*, 26 Minn. 336.

of 1658,"⁶⁶ or "bills payable,"⁶⁷ is not infected with this vice, for by law it is payable to bearer. The same rule applies to a check payable to a fictitious payee.⁶⁸

12. Fictitious Payee.

The more general rule has been declared that a check drawn to the order of a fictitious person is regarded as payable to the bearer, and likewise a check drawn to the order of no actual individual or corporation, but to an object,⁶⁹ for example to "Bills payable."⁷⁰

13. Explanation of Check by Oral Evidence. Writing and Figures.

As a check is a written contract, it possesses the same fixed character in law as other written instruments.⁷¹ Therefore the drawer cannot show, except by express contract, that the payee agreed not to hold him responsible.⁷² Nevertheless oral evidence may be introduced between the original parties to

66 Willets v. Phoenix Bank, 2 Duer (N. Y.) 121.

67 Willets v. Phoenix Bank, 2 Duer (N. Y.) 121.

68 Kohn v. Watkins, 26 Kan. 691; Rogers v. Ware, 2 Neb. 29; Forbes v. Espy, 21 Ohio St. 474; Phillips v. Mercantile Nat. Bank, 140 N. Y. 556. A payee who receives a check knowing that, for the printed name of one bank thereon, another has been substituted, cannot recover from the drawer after the drawee's failure on the ground that the check was drawn on a fictitious payee. Cork v. Bacon, 45 Wis. 192.

69 McIntosh v. Lytle, 26 Minn. 336.

70 Ibid. A bank is protected that pays a check given to the vendor of merchandise by the purchaser, although he is not the person the purchaser supposed him to be. Sherman v. Corn Ex. Bank, 91 N. Y. App. Div. 84; First Nat. Bank v. American Ex. Nat. Bank, 170 N. Y. 88; Robertson v. Coleman, 141 Mass. 231; Emporia Nat. Bank v. Shotwell, 35 Kan. 360; Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230.

71 American Emigrant Co. v. Clark, 47 Iowa 671. See §2, also Chap. XVII. §20.

72 American Emigrant Co. v. Clark, 47 Iowa 671; Fairfield v. Hancock, 34 Me. 93; Gregory v. Hart, 7 Wis. 532; Pack v. Thomas, 13 Sm. & M. (Miss.) 11; Ely v. Kilborn, 5 Denio (N. Y.) 514; Isaacs v. Elkins, 11 Vt. 679; Alabama Nat. Bank v. Rivers, 116 Ala. 1; Halbach v. Trester, 102 Wis. 530; Charles v. Denis, 42 Wis. 56; Dale v. Gear, 38 Conn. 15. But see Cake v. Pottsville Bank, 116 Pa. 264.

solve ambiguities and identify parties.⁷³ There may also be added as a rule of construction that the written sum usually, though not always, controls disagreeing figures.⁷⁴

14. Endorsements.

Checks are often endorsed and for many reasons. Sometimes they are endorsed, either with a good or bad intention, when they ought not to be.

(a.) Thus a collecting agent has no authority to endorse a note or check received in payment.⁷⁵ He should retain and deliver the instrument to his principal.⁷⁶

(b.) Another person may become the equitable owner of a check made payable to the order of a bank, and not endorsed by the institution.⁷⁷ Again, a check drawn to order can be transferred by delivery and by parol.⁷⁸ By non-endorsement, however, the check is rendered non-negotiable and the equities, if there are any, may be shown in defence. And if a check is thus transferred, which has been certified at the holder's request, and there are no equities between the maker and drawee bank the holder can recover the amount of the institution.⁷⁹

73 Sweet v. Stevens, 7 R. I. 375; Cork v. Bacon, 45 Wis. 192; Jackson v. Sill, 11 Johns. (N. Y.) 201; McCullough v. Wainwright, 14 Pa. 171.

74 Smith v. Smith, 1 R. I. 398; National Bank v. Second Nat. Bank, 69 Md. 479. This rule is not always applied. State v. Bank of Western, 34 Neb. 175.

75 Adler v. Broadway Bank, 30 N. Y. Misc. 382, citing many cases; Graham v. U. S. Sav. Institution, 46 Mo. 186; Sinclair v. Goodell, 93 Ill. App. 592; Jackson v. Bank, 92 Tenn. 154. The endorsement is a forgery. Ibid. An agent received of his principal's debtor a check payable to him as agent, which he endorsed and gave to the debtor requesting him to procure a draft. The bank sued the agent as endorser and recovered. Bank v. Dixon, 105 Iowa 148.

76 Graham v. U. S. Sav. Institution, 46 Mo. 186. A bank before paying a check endorsed by an agent should make sure of his authority. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 157.

77 Mackey v. Craig, 144 Ind. 203.

78 Meuer v. Phenix Nat. Bank, 42 N. Y. Misc. 341, affd. 87 N. Y. App. Div. 281; Meuer v. Phenix Nat. Bank, 94 N. Y. App. Div. 331. See Poess v. Twelfth Ward Bank, 43 N. Y. Misc. 45.

79 Ibid.

(c.) It has been often contended that a check payable to the order of a person need not be endorsed by him when presenting it for payment; but the better rule is, the bank can require the holder's endorsement before paying it.⁸⁰

(d.) An endorsement with a rubber stamp is valid.⁸¹ And if this is done by a clerk who makes and deposits collections, a bank should not pay him a check he may have collected on his written endorsement.⁸²

(e.) Concerning the use of oral evidence to explain endorsements, the courts are still pronouncing different opinions.⁸³ In some states between bank and depositor evidence may be admitted to show the endorser's intention,⁸⁴ especially when this is doubtful; in other states this is denied.⁸⁵

But there is less doubt concerning the use of oral evidence to contradict or vary endorsement. An endorsement in blank or for deposit cannot be thus converted into an endorsement for collection;⁸⁶ nor an endorsement in blank into one for iden-

80 Rowley v. National Bank of Deposit, 18 N. Y. Supp. 545; Lynch v. First Nat. Bank, 107 N. Y. 179.

81 Rosenberg v. Germania Bank, 88 N. Y. Supp. 952. See Brown v. Butchers & Drovers' Bank, 6 Hill (N. Y.) 443. See §6.

82 Ibid.

83 See Chap. XVII. §20.

84 Roods v. Webb, 91 Me. 406; U. S. National Bank v. Geer, 55 Neb. 462; Commercial State Bank v. Antelope Co., 48 Neb. 496; Holmes v. First Nat. Bank, 38 Neb. 326; Pool v. Anderson, 116 Ind. 88, 92; Barker v. Prentiss, 6 Mass. 430.

85 Dale v. Geer, 38 Conn. 15.

86 Freeman v. Exchange Bank, 87 Ga. 45; National Com. Bank v. Miller, 77 Ala. 168; Ditch v. Western Nat. Bank, 77 Md. 192, 209; Armour Bros. Bkg. Co. v. Riley Co. Bank, 30 Kan. 163; Martin v. Cole, 3 Colo. 113.

Contra.—Lawrence v. Stonington Bank, 6 Conn. 521; Harrison v. Mc-Kim, 18 Iowa 485; American Emigrant Co. v. Clark, 47 Iowa 671; Stack v. Beach, 74 Ind. 571, 573. In Cake v. Pottsville Bank, 116 Pa. 264—an action by the payee of a note against the endorser—the latter was permitted to show by parol evidence that when the note was made it was agreed that the payee would look to the collateral security, and not the endorser, for payment. In Cook v. Brown, 62 Mich. 473, 479, the court said: "When the endorsement is in blank, or the parties' names are so placed upon the instrument as to leave it doubtful what the real intention of the parties is, then resort may be had to parol evidence," citing many cases.

tification,⁸⁷ nor a restrictive endorsement into an absolute one, thereby depriving the maker of his defence.⁸⁸ The rule is hardly less imperative in shutting out evidence, that an endorsement on a check was made solely for the purpose of identification.⁸⁹ By the application of this rule more than one innocent endorser has been unable to extricate himself without loss. Let us hope that he has not been caught again in this subtle net. The rule rests on the broad foundation that parol evidence cannot be used, save in rare cases, to contradict or explain a written agreement, and further that a bank officer has no authority to release an endorser from the ordinary obligation he assumes in endorsing.⁹⁰

But there are some exceptions to the rule, which have been ably set forth by Justice Butler.⁹¹ One of these is the case of a check, note or other instrument endorsed to the holder for a special purpose and held in trust, and another is an endorsement fraudulently effected. An endorsement of the first kind is one made on a note or check for collection; a fraudulent endorsement is one made by the endorser, solely for identification, yet perverted by the holder of the instrument to subject the endorser to an obligation he never assumed. Why should not evidence be introduced, not to explain or qualify the endorsement, but to show that, in a legal sense, it was never made? The proof in *Thompson v. McKee*⁹² showed that the endorser wrote his name for one purpose, the bank having obtained it, used it for another. The principle invoked by the court to

87 *Alabama Nat. Bank v. Rivers*, 116 Ala. 1.

88 *Alabama Nat. Bank v. Rivers*, 116 Ala. 1; *Thompson v. M'Kee*, 5 Dak. 172.

Contra.—*Commercial Press v. Cresson City Nat. Bank*, 26 La. Ann. 744.

89 *Importers & Traders' Nat. Bank v. Peters*, 123 N. Y. 272; *Clark v. Merchants' Bank*, 2 N. Y. 380; *Leary v. Blanchard*, 48 Me. 269.

90 *Thompson v. M'Kee*, 5 Dak. 172; *Davis v. Randall*, 115 Mass. 547; *Bank v. Dunn*, 6 Pet. (U. S.) 51, 57; *Bank v. Jones*, 8 Pet. 12; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Wyman v. Hallowell & Augusta Bank*, 14 Mass. 58; *Dale v. Geer*, 38 Conn. 15; *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217.

91 *Dale v. Geer*, 38 Conn. 15.

92 5 Dak. 172.

justify the fraud, that an officer without proper consideration has no authority to release an endorser, does not touch the question, for an officer has no authority to commit a fraud.

It has been contended that a wider latitude should be given to explain endorsements between the immediate parties than is given to explain a written contract for the reason that the nature and effect of the contract formed by the law from an endorsement is less perfectly known and regarded by a party when making his endorsement than a written contract which contains the full and specific intentions of the parties.⁹³ Some tribunals stoutly deny the wisdom of creating and preserving the distinction. They maintain that the contract of endorsement made by the law is as clear and specific as any written contract, and if its significance and effect are not as clearly understood as a written contract by the parties thereto, the law is not at fault. This reasoning seems unanswerable yet, as we have seen, a distinction is made by some courts partly, though not wholly, on this ground.

(f.) While a check payable to order is everywhere transferred by the payee by endorsement, a transfer may be made by parol with manual delivery without endorsement. The transferee, however, acquires only such rights as inhere in a non-negotiable check—those of the payee only at the time of making the transfer.⁹⁴

15. A Check is Not Payment.

A check, even where the assignment rule prevails,⁹⁵ is only conditional payment until it is paid,⁹⁶ and in the event of non-

93 U. S. Nat. Bank v. Geer, 55 Neb. 462, 464.

94 Freund v. Imp. & Traders' Nat. Bank, 76 N. Y. 352.

95 Hearrt v. Rhodes, 66 Ill. 351.

96 Marrett v. Brackett, 60 Me. 524; Lowenstein v. Bresler, 109 Ala. 326; Taylor v. Wilson, 11 Met. (Mass.) 44; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; Blair v. Wilson, 28 Gratt. (Va.) 165; Hughes v. Canada Permanent Loan Society, 39 U. C. B. 221. "Paying a customer's check is not paying for the property the customer purchases. It is merely paying the customer's money on his order." Kollock v. Emmert, 43 Mo. App. 566, 569. If a check is given in payment of a bill of exchange, which

payment the holder may resort to the original indebtedness.⁹⁷ In like manner the acceptance of a check or note of a third person for a debt is not payment unless this was the intention of the parties.⁹⁸ Various attempts have been made to resolve this act into one purely of legal interpretation; these have failed, and everywhere the answer is declared to be one of intention, which must be ascertained by inquiry.⁹⁹

Even when the intention to receive a check as payment is not questioned, this clearly implies a check on a solvent bank, with adequate funds in the bank belonging to the maker, for it is not reasonable to suppose that a creditor ordinarily would receive any other as payment.¹ The risk of collection, therefore,

is marked paid and delivered to the drawer, this is payment of the bill; and if the maker stops payment of the check, the holder can recover the amount. *Equitable Nat. Bank v. Griffin*, 113 Cal. 692.

97 *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *People v. Howell*, 4 Johns. (N. Y.) 296; *Briggs v. Holmes*, 118 Pa. 283 and 131 Pa. 233; *Dougherty v. Bash*, 167 Pa. 429; *Cox v. Hayes*, 18 Ind. App. 220; *Born v. First Nat. Bank*, 123 Ind. 78; *Sutton v. Baldwin*, 146 Ind. 361; *Fleig v. Sleet*, 43 Ohio St. 53. A and B sell and ship grain to C, each having an equal interest therein. C's check sent to B payable to him, which is not paid, does not affect the debt C owes A and B. *Krump v. First State Bank*, 8 N. Dak. 75. The holder of a warrant against a municipality who receives a check therefor on an insolvent bank, which is not paid, can recover the amount from the municipality with interest. *Chambers v. Custer Co.* 8 Idaho 724.

98 *Weaver v. Nixon*, 69 Ga. 699; *Mordis v. Kennedy*, 23 Kan. 408. One who receives from his debtor and credits on account the check of a third party, which goes to protest and is charged back to the debtor, is still a bona fide holder and may recover against the drawer. *Rutland Provision Co. v. Hall*, 71 Vt. 208; *Misa v. Currie*, L. R. 1 App. Cas. (Eng.) 554; *Railroad Co. v. National Bank*, 102 U. S. 14. See note to *Currie v. Misa*, 4 Eng. Rul. Cases 330. A long unexplained retention of a check tends to show its acceptance with the conditions on which it was tendered. *Bloomquist v. Johnson*, 107 Ill. App. 154. If a debtor sends a check to his creditor after a dispute concerning a bill of goods with the intention that its acceptance shall be in full of the account, the action of the creditor in cashing the check and appropriating the proceeds operates as an accord and satisfaction. *Creighton v. Gregory*, 142 Cal. 34; *Richardson v. Taylor*, 60 At. (Me.) 796.

99 *Heath v. Page*, 48 Pa. 130, 144.

1 *Fleig v. Sleet*, 43 Ohio St. 53.

is assumed by the debtor, and if the bank on which the check is drawn should fail before paying, the holder having exercised due diligence in presenting it for payment, the loss would fall on the debtor.² But when the creditor, or his agent, is negligent in making presentment, then the debtor is discharged, and the creditor can look only to the maker of the check for payment.³

A different rule applies to a bank that receives a check drawn on itself.⁴ To credit such a check is payment, as we have elsewhere shown.⁵

16. Effect of Presenting Check and Receiving Money.

As soon as the teller or other paying officer has put the money demanded in the possession of the demander his ownership thereto is complete.⁶ He would therefore be the loser were it stolen; it could not be withdrawn from or seized by an attaching officer;⁷ even the teller could not demand its return on the discovery of an inadequate balance belonging to the drawer to reimburse the bank.⁷

17. Care a Bank Must Exercise in Paying. Notice of Maker's Private Memoranda.

In paying checks a bank must exercise care, otherwise depositors would not confide their money to banking institutions. And while they may make reasonable regulations, they cannot through these absolve themselves from the exercise of ordinary care in executing any of their duties.⁸

2 Small v. Franklin Mining Co., 99 Mass. 277.

3 See cases in §18, note 20.

4 Bartley v. State, 53 Neb. 310; Oddie v. National City Bank, 45 N. Y. 735.

5 Hall v. Hatch, 3 Ont. Law Rep. (Can.) 147; Chambers v. Miller, 13 C. B. (Eng. N. S.) 125. A bank teller who passes the bank's money over the counter by way of change parts with the bank's title thereto, even though the receiver chooses to stop and count it and the teller claims the money before the completion of the count. Rex v. Mark, 28 Victorian L. R. 610.

6 See Chap. XXVII, §3.

7 See ante note 5.

8 Chap. XXI, §7. This rule cannot be evaded in executing stop orders by any pass-book regulation. Elder v. Franklin Nat. Bank, 25 N. Y. Misc. 716.

Keeping this general rule in sight a bank is not required to notice the memoranda and figures on the margin of a check, put there by the depositor for his own convenience and benefit. Such a notice must be plain and evident to impose any duty on the paying bank. In like manner, "a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction."⁹

18. Time for Presenting Checks for Payment.

As a check is not intended to circulate like money, it should be promptly presented for payment.¹⁰ Indeed, the holder must observe very definite rules in presenting it, for if he does not, his rights against the drawer may be impaired. First, when the holder and drawee live in the same place, a check must be presented on the same day or on the next after receiving it.¹¹

9 State Nat. Bank v. Dodge, 124 U. S. 333; Duckett v. National Mech. Bank, 86 Md. 400, 409.

10 Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105; First Nat. Bank v. Miller, 37 Neb. 500; Industrial Trust & Sav. Co. v. Weakly, 103 Ala. 458; Watt v. Gans, 114 Ala. 264; Farmers Nat. Bank v. Dreyfus, 82 Mo. App. 399; Tomlin v. Thornton, 99 Ga. 585. A check is properly presented for payment which is taken during business hours by a notary to the drawee bank for demanding payment, and who, on finding the doors closed, makes demand on the president. Niblack v. Park Nat. Bank, 159 Ill. 517.

11 Morris v. Eufaula Nat. Bank, 122 Ala. 580; Aebi v. Bank of Evansville, 124 Wis. 73; Gifford v. Hardell, 88 Wis. 538; Manitoba Mortgage & Invest. Co. v. Weiss, 101 N. W. (S. Dak.) 37; Cox v. Citizens' State Bank, 85 Pac. (Kan.) 762; Jones v. Heiliger, 36 Wis. 149; Grange v. Reigh, 93 Wis. 552; Lloyd v. Osborne, 92 Wis. 93; Kirkpatrick v. Puryear, 93 Tenn. 409; Gregg v. Beane, 69 Vt. 22; Veazie Bank v. Winn, 40 Me. 60; Hamilton v. Winona Salt & Lumber Co., 95 Mich. 436; Haggerty v. Baldwin, 131 Mich. 187; National State Bank v. Weil, 141 Pa. 457; Brown v. Schintz, 202 Ill. 509, affg. 98 Ill. App. 452; Bickford v. First Nat. Bank, 42 Ill. 238; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443; Mohawk Bank v. Broderick, 13 Wend. 133; Smith v. Janes, 20 Wend. (N. Y.) 192; Little v. Phenix Bank, 2 Hill (N. Y.) 425; Smith v. Miller, 43 N. Y. 171; Murphy v. Levy, 23 N. Y. Misc. 147; Tomlin v. Thornton, 99 Ga. 585; Daniels v. Kyle, 5 Ga. 245; Simpson v. Pacific Mutual Life Ins. Co. 47 Cal. 585; O'Brien v. Smith, 1 Black (U. S.) 99; Alexander v. Burchfield, 7 M. & G. (Eng.) 1061. In Idaho by statute (Rev. Stat. §3546) the holder is en-

Second, when they live in different places, the holder must send it forward in a reasonably direct way on the same day or the next, for presentation.¹² Third, when there is a clearing-house in the place of the drawer, a day longer may be given for collection through the medium of this institution.¹³ Fourth, on some occasions, for example, when the holder knows that the bank's failure is impending, he must make an immediate presentation, if possible, to prevent the drawer from loss.¹⁴ This rule is with less urgent reason denied.¹⁵ Fifth, when the last day for making direct presentation, or sending it away for this purpose, falls due on Sunday, the check is payable the following day.¹⁶ Sixth, when the holder is disabled and cannot go in person, yet is able to send it by mail, he will not be excused for not making presentation as required by the above rules.¹⁷

By presenting a check for payment in accordance with these rules the holder preserves his rights against the maker should the drawee not pay. Furthermore, they are not affected by certification.¹⁸

titled to ten days for making presentation. *Chambers v. Custer Co.*, 8 Idaho 724. A check received by the payee seventeen miles from the drawee should be presented at latest on the second day after receiving it. *Hamlin v. Simpson*, 105 Iowa 125.

¹² *Himmelmann v. Hotaling*, 40 Cal. 111; *Woodruff v. Plant*, 41 Conn. 344; *Daniels v. Kyle*, 5 Ga. 245; *Griffin v. Kemp*, 46 Ind. 172; *Freiberg v. Cody*, 55 Mich. 108; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425; *Werk v. Mad River Bank*, 8 Ohio St. 301; *Blair v. Wilson*, 28 Gratt. (Va.) 165; *Lloyd v. Osborne*, 92 Wis. 93; *Gregg v. Beane*, 69 Vt. 22; *Hare v. Henty*, 10 C. B. (N. S.) 65; *Prideux v. Criddle*, L. R. 4 Q. B. 455. See Chap. XVIII. §6.

¹³ *Willis v. Finley*, 173 Pa. 28; *Loux v. Fox*, 171 Pa. 68.

Contra.—*Edmisten v. Herpolzheimer Co.*, 66 Neb. 94; *Holmes v. Roe*, 62 Mich. 199.

¹⁴ *First Nat. Bank v. Alexander*, 84 N. C. 30; *Herider v. Phoenix Loan Assn.*, 82 Mo. App. 427. See Ch. XVIII. §17.

¹⁵ *Northwestern Iron Co. v. National Bank*, 70 Ill. App. 245.

¹⁶ *Campbell v. International Life Ass. Society*, 4 Bos. (N. Y.) 298, 318; *Lindenmuller v. People*, 33 Barb. (N. Y.) 548, 569; *Commercial Bank v. Varnum*, 49 N. Y. 269, 279; *Salter v. Burt*, 20 Wend. (N. Y.) 205; *Cox v. Boone*, 8 W. Va. 500; *Kershaw v. Ladd*, 34 Or. 375, 380.

¹⁷ *Purcell v. Allemong*, 22 Gratt. (Va.) 739.

¹⁸ *Northwestern Iron Co. v. National Bank*, 70 Ill. App. 245.

The rule of diligence does not require presentment to be made at any particular period within the time above stated. Consequently, the payee or holder of a check does not lose his right to recover by the suspension or failure of the bank within the prescribed period, provided the check is afterward presented within the period prescribed.¹⁹

The same rule applies to a check accepted by a creditor from his debtor that has been drawn by another person. If presentment is duly made, the creditor, unless he has agreed to accept the check as payment, has lost nothing by receiving it. But if he has been negligent in his presentment, the acceptance of the check operates as payment, and this rule applies to checks and notes of third parties taken in payment of a debt not signed or endorsed by the debtor.²⁰

19. Presentation to Non-Drawee Bank.

A check or draft may be presented for payment to another bank than that on which it is drawn.²¹ This has long been the practice, though there are some additional risks in paying them, especially in passing on their genuineness.²²

20. Consequences of Not Observing Rules Governing Presentation.

If these rules are not observed, and the drawee bank fails, the holder cannot look to the drawer, if he would be injured, for payment, for the fault is the holder's in not making presen-

19 Haggerty v. Baldwin, 131 Mich. 187; Hamilton v. Winona Salt Co., 95 Mich. 436; Lloyd v. Osborne, 92 Wis. 93.

20 Manitoba Mortgage Co. v. Weiss, 101 N. W. (S. Dak.) 37, 39; Kilpatrick v. Home Building Assn., 119 Pa. 30; Anderson v. Gill, 79 Md. 312, 321, citing many cases. See also First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Comer v. Dufour, 95 Ga. 376.

21 Murray v. Bull's Head Bank, 3 Daly 364.

22 See Chap. X.XIV. §9. A depositor drew nine checks on a bank, which failed before paying them. He deposited enough money in another bank for this purpose and requested the bank to honor them. One of them had been previously certified by the first bank, yet was inadvertently paid by the second. The certifying bank at the time of certifying had the money to pay it. It was a question of fact for the jury to decide whether the teller did right to pay it. The court decided against him. Tomlinson v. National German-Am. Bank, 73 Minn. 117.

tation as the law requires.²³ But if no injury would happen to the drawer by paying he must do so before the statute of limitations releases him,²⁴ while the endorser is absolutely discharged.²⁵ The rule, too, covers an original indebtedness of the endorser for the payment of which the check was endorsed.²⁶ After a delayed presentation, however, as the drawer is presumed to have been injured²⁷ the burden of proof is on the holder to show that the drawer was not injured by disregarding the rules.²⁸

Of course, delay to present a check drawn against an insufficient fund, or none whatever, never discharges the drawer,

23 Watt v. Gans, 114 Ala. 264; Hoyt v. Seeley, 18 Conn. 353; Industrial Bank v. Bowes, 165 Ill. 70; Comer v. Dufour, 95 Ga. 376, 378; Compton v. Gilman, 19 W. Va. 312; Williams v. Brown, 53 N. Y. App. Div. 486.

24 Bull v. First Nat. Bank, 123 U. S. 105; Ames v. Meriam, 98 Mass. 294; First Nat. Bank v. Harris, 108 Mass. 514; Cox v. Citizens' State Bank, 85 Pac. (Kan.) 762; Stewart v. Smith, 17 Ohio St. 82; Morris v. Eufaula Nat. Bank, 122 Ala. 580; Carroll v. Sweet, 128 N. Y. 19; Industrial Bank v. Bowers, 167 Ill. 70, revg. 64 Ill. App. 300; Heartt v. Rhodes, 66 Ill. 351; Merritt v. Gate City Nat. Bank, 100 Ga. 147; Comer v. Dufour, 95 Ga. 376, 378; Patten v. Newell, 30 Ga. 271; Daniels v. Kyle, 1 Ga. 304, s. c. 5 Ga. 245; Herider v. Phoenix Loan Assn., 82 Mo. App. 427; First Nat. Bank v. Buckhannon Bank, 80 Md. 475, 481; Morrison v. McCartney, 30 Mo. 183; Selby v. McCullough, 26 Mo. App. 66; Nelson v. Kastle, 105 Mo. App. 187. And if he has suffered loss, he can recover only to the extent of it. Long v. Eckert, 73 Mo. App. 445.

25 Gough v. Staats, 13 Wend. (N. Y.) 549; Mohawk Bank v. Broderick, 10 Wend. 304, affd. 13 Wend. 133; First Nat. Bank v. Miller, 37 Neb. 500; Aebi v. Bank of Evansville, 124 Wis. 73; Comer v. Dufour, 95 Ga. 376; Carroll v. Sweet, 128 N. Y. 19; Lewis v. Commercial Nat. Bank, 83 S. W. (Tex. Civ. App.) 423; Kirkpatrick v. Puryear, 93 Tenn. 409; Bank v. Merritt, 7 Heisk. (Tenn.) 193; Schoolfield v. Moon, 9 Heisk. 173.

Contra.—Small v. Franklin Mining Co., 99 Mass. 277. When an endorsed check is presented for payment and another check or draft is given in payment "if the (holder's) acceptance of the drawee's check does not of itself discharge an endorser of the original check, the endorser should certainly be held discharged if the substituted check is not presented promptly and the collection is thereby defeated." Comer v. Dufour, 95 Ga. 376, 379.

26 Kirkpatrick v. Puryear, 93 Tenn. 409.

27 Watt v. Gans, 114 Ala. 264.

28 Hamlin v. Simpson, 105 Iowa 125; Kirkpatrick v. Puryear, 93 Tenn. 409.

for he had no right to give such a check.²⁹ And the same rule applies to a depositor who has intentionally drawn out his deposit after appropriating it to a checkholder, for, after doing this, it belongs to the latter and ought to remain in the bank subject to his disposition.³⁰

21. Drawer May Waive His Rights Gained by Non-Presentation.

The drawer of a check may waive any right he has gained by reason of the failure of the payee or holder to present it to the drawee within a reasonable time. The waiver may be accomplished in various ways. If, with knowledge of the payee's negligence and the insolvency of the drawee, the drawer promises to make good the check to the holder, this would amount to an express waiver. A waiver may also be inferred from circumstances provided they indicate clearly and unequivocally an intent on the drawer's part to continue his liability. Whether express or implied, it is assailable only in cases of voluntary action by the drawer with full knowledge of the payee's negligence and of the subsequent presentment and dishonor of the check.³¹

22. An Endorser Who is Discharged and Ignorantly Pays Can Recover His Money.

Furthermore, an endorser who pays a check without knowing that he is discharged through the holder's improper conduct can recover the money.³² But a different rule applies to a surety, because he is not released like an endorser through the holder's neglect to demand payment and give notice.³³ Again,

29 Carson v. Fincher, 138 Mich. 666; Moody v. Mack, 43 Mo. 210, 212; Morrison v. McCartney, 30 Mo. 183. A verbal request by the drawer not to present his check for payment until a later day excuses prior presentation. Pollard v. Bowen, 57 Ind. 232. See Carroll v. Sweet, 128 N. Y. 19.

30 Nelson v. Kastle, 105 Mo. App. 187.

31 Rockwell v. Dye, 42 N. Y. App. Div. 520, 522; Meyer v. Hibscher, 47 N. Y. 265; Ross v. Hurd, 71 N. Y. 14; Murphy v. Levy, 23 N. Y. Misc. 147; Hazleton v. Colburn, 1 Robt. (N. Y.) 345, and cases cited.

32 Martin v. Home Bank, 160 N. Y. 190; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Carroll v. Sweet, 128 N. Y. 19; Lake v. Artisans' Bank, 3 Abb. N. Y. Ct. of App. 10.

33 Newman v. Kaufman, 28 La. Ann. 865.

such an endorser need not return the check for reimbursement before bringing his action.³⁴

23. Holder Must Give Notice of Non-Payment.

When presentation is properly made, and the bank declines to pay, the holder must give notice of non-payment to the drawer and endorsers.³⁵ The same rules apply in giving notice as apply to bills of exchange.³⁶ Indeed, as a check is presumed to be drawn against deposits, the reason is still stronger for notifying him of non-payment in order that he may speedily inquire into the causes of refusal.³⁷ Furthermore, a drawee bank to which a check is mailed for payment and is not paid for lack of funds, should inform the holder of its action.³⁸ A notice to one partner of a partnership check will suffice.³⁹

The notification of the drawer the day after presentation and non-payment of his check is sufficient.⁴⁰ And in no case is protest necessary to fix the liability of any party, though it is often given.⁴¹

24. When Notice is Excused.

A fruitless presentation need not be made. More specifically this need not be done when the drawer has no funds, and there is no reasonable expectation that the check, if presented, will

34 Martin v. Home Bank, 160 N. Y. 190.

35 Harker v. Anderson, 21 Wend. (N. Y.) 372; Pollard v. Bowen, 57 Ind. 232; Minturn v. Fisher, 4 Cal. 35; Daniels v. Kyle, 5 Ga. 245; Kelley v. Brown, 5 Gray (Mass.) 108; Sherman v. Comstock, 2 McLean (U. S.) 19; Foster v. Paulk, 41 Me. 425; Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933; Heylyn v. Adamson, 2 Bur. (Eng.) 669; Rushton v. Aspinall, 2 Doug. (Eng.) 679. A drawer's promise to pay an overdue check without knowing that it had not been duly presented for payment is not binding. Kelley v. Brown, 5 Gray (Mass.) 108.

36 1 Dan. on Neg. Inst., §1586.

37 Ibid; Purcell v. Allemong, 22 Gratt. (Va.) 739, 742.

38 Ripley Nat. Bank v. Latimer, 64 Mo. App. 321.

39 N. Y. & Ala. Contracting Co. v. Meyer, 51 Ala. 325.

40 Jones v. Heiliger, 36 Wis. 149.

41 Ibid; Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933.

be paid.⁴² This is especially true when he has withdrawn his funds,⁴³ or the bank has become insolvent within the time for which the drawer is liable,⁴⁴ and lastly, when he is prevented by extraordinary causes,⁴⁵ or has delayed presentation by agreement.⁴⁶

25. Payment of Stale Check.

When a check is not presented in accordance with the rules already mentioned two questions may arise: one between the holder and the bank, the other between the holder and the maker. The bank must pay unless a reason clearly appears for doing otherwise, and a delay of a few days or even six months will not impair the holder's right to insist on payment. Whether the taker of a check that has run for a considerable period, or the bank in paying it, has exercised a reasonable caution is a question of fact and must be answered in every inquiry.⁴⁷ In one of the leading cases the maker of a check had no funds in the bank to meet it at the time of its delivery or afterward. A year after the date the bank paid the check, meantime the drawer had discharged the original debt. He refused to pay the bank and having been sued therefor the court declared that the circumstances were sufficient to put the

42 Hill v. Norris, 2 Stew. & Porter (Ala.) 114; Sutcliffe v. McDowell, 2 Nott. & Mc. (S. C.) 251; Culver v. Marks, 122 Ind. 554; Hamlin v. Simpson, 105 Iowa 125; Foster v. Paulk, 41 Me. 425; Bond v. Farnham, 5 Mass. 170; Shaffer v. Maddox, 9 Neb. 205; Brush v. Barrett, 82 N. Y. 400; French v. Bank of Columbia, 4 Cranch (U. S.) 141; First Nat. Bank v. Linn Co. Bank, 30 Or. 296; Warrensburg Co-operative Assn. v. Zoll, 83 Mo. 94; Carson v. Fincher, 101 N. W. (Mich.) 844.

43 Deener v. Brown, 1 MacArthur (D. C.) 350; Fletcher v. Pierson, 69 Ind. 281; Emery v. Hobson, 63 Me. 32; Kenyon v. Stanton, 44 Wis. 479.

44 Colton v. Drovers' Perpetual B. & L. Assn., 90 Md. 85, 95; Planters' Bank v. Farmers' & Mech. Bank, 8 Gill & J. 449; Morrison v. McCartney, 40 Mo. 183; Syracuse R. v. Collins, 3 Lans. (N. Y.) 29; Warrensburg Co-operative Assn. v. Zoll, 83 Mo. 94.

45 Moody v. Mack, 43 Mo. 210; Linville v. Welch, 29 Mo. 203; Adams v. Darby, 28 Mo. 162.

46 Pollard v. Bowen, 57 Ind. 232.

47 First Nat. Bank v. Needham, 29 Iowa 249.

bank on inquiry and that it could not recover from the drawer.⁴⁸

The second question is more difficult to answer. What delay in presentment or course of the check prior thereto will subject it to the equities of the drawer against the holder? In the case of *First National Bank v. Needham* a bank purchased a check five months after it was drawn without making any inquiries of the owner. It was decided that the check was subject to the same equities as during the original payee's ownership.⁴⁹ A check taken fourteen months after its date is, without explanation, to be deemed discredited and subject to any defence existing between the payee and the drawer.⁵⁰ But a check acquired five days after its delivery to the drawee is not then overdue, subjecting it to any defence that may have existed between the original parties.⁵¹

26. Presentation by Mail to the Drawee.

Whether a check can be presented by the holder by mail directly to the drawee is an open question. In some states this is forbidden,⁵² in others this is permitted.⁵³ In the latter, the

48 *Lancaster Bank v. Woodward*, 18 Pa. 357. A check made by an intestate a month before his death and not presented by the holder for several months after that event, may be legally regarded as not received by the holder for a valuable consideration, nor in the usual course of business. *Dinley v. McCullagh*, 92 Hun (N. Y.) 454; *Stimson v. Vroman*, 99 N. Y. 74.

49 29 Iowa 249.

50 *Cowing v. Altman*, 71 N. Y. 435. A check held for twenty-six days is stale and a holder who then takes it is subject to all the defences the drawer could have made against the original payee. *Farmers' Nat. Bank v. Dreyfus*, 82 Mo. App. 339. A special deposit made by A to be paid to B and C on their joint check, which is not checked out by them within sixteen months, should be returned to A on his demand therefor. *Bank v. Harding*, 1 Kan. App. 389.

51 *Feeley v. Bull*, 163 N. Y. 397, affg. 25 App. Div. 621; *First Nat. Bank v. Harris*, 108 Mass. 514.

52 See §37. *Drovers' Nat. Bank v. Anglo-Am. Provision Co.*, 117 Ill. 100; *Lowenstein v. Bresler*, 109 Ala. 326; *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. 967. See Chap. XVIII. §5.

53 *Indig v. National City Bank*, 80 N. Y. 100. See §37.

drawee is the agent of the holder for the purpose of making the remittance, or of giving notice of the dishonor of the check when payment is refused.⁵⁴

27. Payment When Deposit is Insufficient.

Not infrequently a depositor, through forgetfulness or otherwise, draws his check for a larger sum than he has on deposit. In such a case the bank may decline to pay whatever it may have.⁵⁵ On the other hand, it may pay over the insufficient amount, crediting it on the holder's check.⁵⁶ No reason is perceived, if the holder is willing to give up his check for whatever may be due to the depositor, why the bank should refuse to pay it. The reason usually given, that this is not a fulfillment of the drawer's order, is not satisfactory, for it is quite as reasonable to presume that the drawer supposed at the time of drawing his check that his deposit was sufficient. If so, is not the presumption fair that he would be pleased to have the bank pay, and the depositor receive, the sum in the bank?

Nor is a bank liable for a check drawn on insufficient funds simply because it has on several occasions overpaid similar orders of the depositor.⁵⁷ Again, after a bank has declined to pay a check from lack of funds, it has no right to reconsider its action, especially after receiving knowledge of the maker's death.⁵⁸

54 Ripley Nat. Bank v. Latimer, 64 Mo. App. 321, 328; Farwell v. Curtis, 7 Biss. (U. S.) 160; Lowenstein v. Bresler, 109 Ala. 326.

55 Lowenstein v. Bresler, 109 Ala. 326; Merchants & Planters' Bank v. Meyer, 56 Ark. 499; Beauregard v. Knowlton, 156 Mass. 395; Dana v. Third Nat. Bank, 13 Allen (Mass.) 445; Bullard v. Randall, 1 Gray (Mass.) 605; Merchants' Bank v. National Bank, 139 Mass. 513, 524; Henderson v. U. S. Nat. Bank, 59 Neb. 280; Bank v. Brewing Co., 50 Ohio St. 151; Rouse v. Calvin, 76 Ill. App. 362, 365; Jacobson v. Bank, 66 Ill. App. 470; Bank v. Union Trust Co., 149 Ill. 343; Coates v. Preston, 105 Ill. 470; Pabst Brewing Co. v. Reeves, 42 Ill. App. 154; St. John v. Homans, 8 Mo. 382; Murray v. Judah, 6 Cow. (N. Y.) 484; In matter of Brown, 2 Story (U. S.) 502. See Chap. VII. §3.

56 Bromley v. Commercial Nat. Bank, 9 Phila. 522.

57 Schoonmaker v. Gilmore, 84 Ill. App. 17.

58 Weiand v. State Nat. Bank, 112 Ky. 310.

28. Payment on Simultaneous Presentation of Several Checks.

On the presentation of two or more checks simultaneously several practices among banks prevail; the more general is to send all the checks back, a step that is likely to be followed by a separate presentation with the chances of payment in favor of the nearest bank, unless the representative of some other can overcome the natural advantage by running faster or flying. Another practice, having legal sanction, is to pay the smaller checks covered by the drawer's deposit.⁵⁹

Mere priority in the drawing of a check confers no superior rights on the holder, except where the Illinois rule prevails. This was declared nearly sixty years ago by Chancellor Walworth in a case which still forms the most prominent headland on this subject.⁶⁰ Yet if priority of date furnished a rule it would often be inadequate, as a maker might give several or all the checks covered by his balance on the same day.

Suppose a debtor has two creditors, and he gives to one a check on his bank for a particular sum, to the other a check for all the funds in the bank to his credit; and the second check is presented first, shall the bank pay him all? It is safe in paying the check for the fixed amount, provided the payee of the second knew that the depositor's intention was to pay him only the balance after paying the other.⁶¹

29. Duty of Bank to Pay Unpaid Checks from Future Fund.

After refusal to pay a check for lack of funds, there is no presumption that it still remains for payment, consequently the bank is not required to reserve from a future deposit enough to satisfy it.⁶² This is the better rule, though it has not been adopted everywhere.⁶³ Indeed, the contrary rule has been so strongly maintained as to give such a check-holder a

59 Sherburne v. Rickards, Superior Ct. Chicago, 1898. 15 Bkg. L. J. 536.

60 Dykers v. Leather Manuf. Bank, 11 Paige (N. Y.) 612.

61 Atlanta Nat. Bank v. George, 109 Ga. 682.

62 Gilliam v. Merchants' Nat. Bank, 70 Ill. App. 592.

63 Rosenbaum v. Lytle, 8 Ky. L. Rep. 607.

stronger lien to the subsequent deposit than an attaching creditor of the depositor.⁶⁴

On the other hand, if a person gives his check to another on condition that it shall not be presented for payment until the drawee has received funds from another check given to the maker, on another bank, and he then seeks to prevent their collection, the holder of the first check may present it for payment and sue to recover thereon should it be dishonored.⁶⁵

30. Bank and Depositor Can Agree on the Application of a Future Deposit.

Where the assignment rule exists, a bank cannot agree with a depositor to withhold payment of checks outstanding if the deposit is insufficient, for the drawing and delivery of the check is an assignment of the drawer's funds to the holder which the bank has no right to disregard.⁶⁶ But a depositor's order to pay checks drawn by him as agent from his individual account will not avail in an action by a holder against the drawer without notice of the direction.⁶⁷

31. Holder's Right to Inquire Concerning Drawer's Account.

The contention has been raised that a bank official is not required to answer any questions touching the condition of the depositor's account on the presentation of a check, which the bank declines to honor.⁶⁸ It certainly is the law that he cannot withhold such information from a court demanded in a proper legal proceeding on the ground that it is "a confidential communication."⁶⁹ Is there any good reason for declining to in-

⁶⁴ Ibid.

⁶⁵ Batavian Bank v. North, 114 Wis. 637.

⁶⁶ Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, revg. 69 Ill. App. 681.

⁶⁷ Armstrong v. Brolaski, 46 Fed. 903. See Chap. XXVII, §6. "If the deposit be for a special purpose, under instructions, these instructions must be complied with by the bank." Rice v. Citizens' Nat. Bank, 21 Ky. L. Rep. 346, 347.

⁶⁸ Taylor v. Commercial Bank, 174 N. Y. 181.

⁶⁹ Loyd v. Freshfield, 2 C. & P. (Eng.) 325. See Forbes' Case, 41 L. J. Ch. 467.

form a check-holder whose check it refuses to pay? In England it has long been held that a banker is bound to answer what a party's balance was on a given day, as it is not a privileged communication,⁷⁰ and the same view has recently been maintained in this country.⁷¹

32. Drawer's Liability to Holder Can be Changed by Agreement.

The liability of a drawer of a check to the holder can be changed only by express agreement at the time of its delivery. Such an agreement cannot affect a subsequent holder having no notice of it.⁷²

33. Drawee Must Pay Right Person.

A bank must pay only on the order of the depositor, consequently, if any mistake is made it cannot charge the check to the depositor; nor can it always recover the money, even from the payee. Mistake of identity and all others of a like character are visited on the bank, and not on the drawer, for he expects the bank to guard his interests in paying out his money.⁷³

Furthermore, when the bank has made an erroneous payment, the depositor may sue either the bank, or the receiver of the money, but not both unless they are acting jointly to wrong

⁷⁰ Loyd v. Freshfield, 2 C. & P. 325; see also Mackenzie v. Taylor, 6 L. C. J. 83; Hannum v. M'Rae, 18 Ont. Pr. Rep. (Can.) 185.

⁷¹ In re Davies, 68 Kan. 791.

⁷² Jones v. Heiliger, 36 Wis. 149.

⁷³ Ch. XXIV. §3. A gave his note to a bank with a surety. The maker offered to pay it by giving a draft on New York. The bank offered to collect the draft and apply the proceeds in the discharge of the note. By mistake the cashier, supposing the draft had been paid, cancelled and delivered the note. On discovery of his mistake, the bank could hold both the principal and surety. Dewey v. Bowers, 4 Ired. (N. C.) 538. A bank that pays out the money of a depositor, who is unable to write his name, to one who assures the bank that he is authorized to sign for him is liable to the depositor for the amount. Georgia R. & Bkg. Co. v. Love & Good Will Society, 85 Ga. 293. A bank that undertakes to deliver a check gratuitously is only liable for gross negligence in identifying the payee. King v. Exchange Bank, 106 Mo. App. 1.

the depositor.⁷⁴ Again, money paid to an agent or messenger, who faithfully pays over the same, can be recovered only of the principal.⁷⁵

34. Recovery of Payment Made by Mistake.

The payment of a check through mistake of fact may be recovered back, but there is much confusion in the application of the rule.⁷⁶ This phrase has several distinct meanings.

(a.) Is an act a mistake which is done on a supposed state of facts, which are otherwise, and the truth is within the bank's knowledge or possession? Thus, a bank credits a depositor with a check drawn on the bank and debits the maker, supposing his account is good for the amount. Generally, this is not a mistake that can be corrected for all the evidence of the truth is in the bank's possession.⁷⁷ Says the Supreme Court of New Jersey: "As between the holder of a check and the bank upon which it is drawn, the latter is bound to know the state of the depositor's account. . . . Therefore, where a bank receives in the ordinary course of business a check drawn upon it, and presented by a bona fide holder, who is without notice of any infirmity therein, and the bank pays the amount of the check to such holder, it finally exercises its option to pay or not to pay, and the transaction is closed as between the parties to the payment."⁷⁸

74 Jones v. First Nat. Bank, 3 Neb. (Unof.) 73; Chambers v. Custer Co., 8 Idaho 724.

75 Penacook Sav. Bank v. Hubbard, 58 N. H. 167.

76 See Chaps. XVIII. §§6, 12; XXIV. §§9-11; XXVI. §5.

77 Whiting v. City Bank, 77 N. Y. 363; Kingston Bank v. Eltinge, 40 N. Y. 391; Lawrence v. American Nat. Bank, 54 N. Y. 433; Troy City Bank v. Grant, Hill & Denio (N. Y.) 119; Mayer v. Mayor of New York, 2 Hun (N. Y.) 306. "There is no legal presumption that payments made by a bank are made by mistake, even when the account of the party for whom they are made is not good." Whiting v. City Bank, 77 N. Y. 363, 367.

78 National Bank v. Berrall, 70 N. J. Law 757, citing Boylston Nat. Bank v. Richardson, 101 Mass. 287; Oddie v. National City Bank, 45 N. Y. 735; Manuf. Nat. Bank v. Swift, 70 Md. 515; Riverside Bank v. First Nat. Bank, 20 C. C. A. 181; National Bank v. Burkhardt, 100 U. S. 686.

This is not the opinion everywhere. In some jurisdictions such action is a mistake whenever the bank would not have given the credit had it supposed the maker's deposit was insufficient to cover the credit.⁷⁹ The same rule has been applied to an erroneous certification made under the same conditions.⁸⁰ But there is no legal presumption that payments or certifications are made by mistake simply because the accounts of the parties for whom these things are done are not larger. A bank may advance or certify as a favor. Consequently the fact of mistake must be proved.⁸¹

(b.) Is an act a mistake which was founded on several correct facts, but which suddenly change in time for the bank to take different action before other parties, that are unfavorably affected, can find this out? Thus, a bank credits a depositor and charges the maker of a check, knowing the state of his account, that the charge perhaps is an overdraft, but soon after, learning of his failure, changes the record, can this be done? On several occasions courts have given an affirmative answer.⁸²

On one of them A, who had an account with B, a private banker, deposited with him a note payable at the bank of C. On its maturity B presented it to C and received payment. C then discovered the maker's inability to pay it; soon afterward he assigned. C asked B to refund, who complied. A then sought to check out the amount, but the court held that as C had paid under a mistake of fact, B had acted rightly and therefore had no fund in his possession belonging to A.⁸³ Was the payment by C a mistake tested by either of the principles mentioned? At the time of paying he had all the evidence he needed to ascertain the condition of the maker's account, and if he chose to pay without making an examination, was not this pure negligence? Or, if the second principle be applied, was there

79 Steinhart v. National Bank of D. O. Mills & Co., 94 Cal. 362.

80 National Park Bank v. Steele & Johnson Mfg. Co., 58 Hun (N.Y.) 81.

81 Whiting v. City Bank, 77 N. Y. 363, 367.

82 See Chap. XVIII. §6.

83 Meredith v. Haines, 14 Pa. Week. Notes 364.

any mistake at the time of paying? Tested by this principle, the mistakes arose by reason of a subsequent event, and the knowledge thereof, the insolvency of the maker.

If acts done just as the doers intended can be converted into mistakes by reason of the happening of subsequent events, and a recovery can be demanded, then a very slippery doctrine is established that will prove most difficult of application. Must not this principle be rightly applied to present facts, those in existence at the time of acting, in which the truth could not be ascertained with a reasonable degree of diligence? In such cases there is a strong sense of justice in granting relief,⁸⁴ but none whatever when the so-called mistake might have been easily avoided.

What, then, is a mistake of fact? The following may serve as illustrations covering a large field of cases: A bank replied to an inquiry from B that it would pay "C's checks for cattle." C drew a draft for a much larger sum, which the bank, without knowledge of the truth, paid. For the excess the bank had a clear right to recover.⁸⁵ Again, a tax erroneously assessed cannot be recovered, if in truth the payor had agreed thereto, but subsequently determined to recover the amount.⁸⁶ Lastly, a bank cannot invoke this rule to recover money paid to the holder of a check who knew nothing about the order of the maker countermanding its payment.⁸⁷

35. An Agent Authorized to Deposit Has No Implied Authority to Draw.

An agent who is authorized to make a deposit in a bank has no implied authority to draw it out.⁸⁸ In a case wherein this

84 Such a case was the following: An article was delivered for storage and safekeeping. Unable to find it when demanded and supposing it had been stolen, B gave the owner a check for the value. The article was found, and the check was demanded and recovered. *State Sav. Bank v. Buhl*, 129 Mich. 193.

85 *First State Bank v. McGaughey*, 86 S. W. (Tex. Civ. App.) 55.

86 *In re Morgan's Estate*, 125 Iowa 247.

87 *National Bank v. Berrall*, 70 N. J. Law 757.

88 *Walker v. State Trust Co.*, 40 N. Y. App. Div. 55.

principle was disputed, the contention was that a person might deposit in a fictitious name, or give any name he chose to the bank. Such action does affect the rule. This relates to a real person, and when money has been deposited by an agent for a real principal, a bank that permits him to draw it out without proper authority from his principal does so at its own peril.⁸⁹ But if an agent has proper authority,⁹⁰ the bank may safely pay him so long as it continues. On learning of its termination, the bank should immediately cease.⁹¹

36. Authority of a Guardian to Draw.

The authority of a guardian to draw a deposit belonging to his ward is strictly construed. Thus a special guardian was directed by a court to deposit a fund in a bank, who received a certificate stating that the bank would repay the money to the ward or her assigns on the return of the certificate. The bank was declared to be not justified in paying the deposit afterward to the guardian on the return of the certificate.⁹² In another case a deposit belonged to a person as administrator of an estate. Afterward he became insane and his guardian drew a part of the deposit. Nevertheless, the payment was held to be without legal justification.⁹³ It is true the bank was guilty of no intentional wrong, and the decision rested on slender ground.

⁸⁹ Honig v. Pacific Bank, 73 Cal. 464.

⁹⁰ The treasurer of a company sent by a messenger to a bank where it kept an account, a check endorsed to the order of the cashier, with a deposit ticket. The messenger presented the check and demanded the money, saying the company wished it to pay their employes. The bank complied, though knowing that this was not the usual course of business. It was nevertheless liable for the amount to the company. Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421.

⁹¹ Baeschlin v. Chamberlain Bkg. House, 93 N. W. (Neb.) 412.

⁹² Walker v. State Trust Co., 40 N. Y. App. Div. 55, revg. 24 Misc. 498.

⁹³ Ryan v. North End Sav. Bank, 168 Mass. 215. "The defendant had notice that the owner of the certificate was an infant and could not, of her own power constitute an agent to collect its amount. Any authority to withdraw the deposit must have proceeded either from some appointment as guardian or some order of the court." Ibid.

37. Sending Checks or Money by Mail.

Usually, the mail is the agent of the sender,⁹⁴ unless the transmission is by the request, and for the greater benefit of the receiving party.⁹⁵ In determining the risk of transmission at least three classes must be considered, depositors, debtors owing notes and other obligations to the bank, and agents for collection.

As the office of a bank is the place where it receives and pays money and transacts its business generally, a depositor who transmits money to a bank for deposit incurs the risk of transmission until it is duly received.⁹⁶ In like manner if he sends for money the risk of transmission is his,⁹⁷ though the bank must use due precaution, employing the registered mail or other equally safe way.⁹⁸

As a debtor who owes a bank must pay at its office, should he use the mail for the purpose of transmitting the money, he would incur the risk of loss unless he could "show that the creditor authorized this mode of transmittance either by express assent or direction, or a usage or course of dealing from which such assent or direction may be fairly inferred."⁹⁹

94 See §26. *Norman v. Rickets*, Lond. Bank. Mag. June, 1855, p. 47, for description of case, see Bolles on Banks and their Dep. §102 (b) p. 106; *Gurney v. Howe*, 9 Gray (Mass.) 404. A check sent by mail and never received by the addressee, remains the property of the sender. *Garthwaite v. Bank of Tulare*, 134 Cal. 237, 241. Likewise a certificate of deposit sent to the addressee without his knowledge or request. *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295.

95 *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85, 87; *Jung v. Second Ward Sav. Bank*, 55 Wis. 364; *Graves v. American Ex. Bank*, 17 N. Y. 205. See ante, §26 and Chap. XVIII. §5.

96 *Miller v. Western Nat. Bank*, 172 Pa. 197, 201. A bank that contracts to receive deposits by registered mail is not liable for a deposit thus sent which it refused to receive after banking hours on the day of presentation which, during the night, was stolen from the post-office. *Simpson v. Pennigwassett Nat. Bank*, 68 N. H. 289.

97 *Jung v. Second Ward Sav. Bank*, 55 Wis. 364; *Burr v. Sickles*, 17 Ark. 428; *Warwicke v. Noakes*, 1 Peake (Eng.) 69; *Hawkins v. Rutt*, 1 Peake (Eng. 3d Ed.) 248; *Walter v. Haynes, Ry. & M. (Eng.)* 149.

98 *Clay City Nat. Bank v. Conlee*, 106 Ky. 788. In this case the court said that the bank ought to have taken a receipt from the post-office for it.

99 *Gurney v. Howe*, 9 Gray (Mass.) 404. Justice Bigelow added: "If

As between collecting agents a different rule applies. As a collecting agent or sub-agent does not own the checks or other instruments, or their proceeds, there can be no question about ownership in such cases. The agent is a bailee, he may nevertheless be responsible for any loss springing from his negligence in transmission.¹

To a collector, however, who is a debtor to the sending party the same rule applies, unless changed by special agreement, as to any other debtor who transmits money to his creditor. The risk of transmission is wholly the debtor's, who also is the owner and controller of the money until it is delivered.² Nor has the highest federal court established a different rule. It is somewhat difficult to understand the principle, if indeed there was any, which the court sought to adopt in the McDonald case; the most intelligible interpretation of Justice Shiras's opinion is, the case was decided on the facts recited, rather than on any principle. These were that "the mailing of the checks and remittances was a delivery to the bank" that ultimately received them, "whose property therein was not destroyed or impaired by the subsequent act of bankruptcy," though this happened before the remittances were received by the other bank.³

Whether a debtor who has thus delivered money or a draft to the post-office for transmission to his creditor has parted with all right and dominion over it so completely that under the circumstances he cannot recover it is a question worth considering. By an old statute⁴ transmission of letters has been

this can be shown, then the transmission is at the risk of the creditor; otherwise it lies upon the debtor."

¹ First Nat. Bank v. First Nat. Bank, 116 Ala. 520; Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641.

² "As a rule, a letter and its contents are subject to the control of the writer and sender until it is actually delivered to the addressee." Carley v. Potter's Bank, 46 S. W. (Tenn. Ch. App.) 328, 330. See United States v. Tanner, 6 McLean (U. S.) 128. But does the same rule apply to a sender who is an agent of the addressee? See Chap. XVIII. §6.

³ McDonald v. Chemical Nat. Bank, 174 U. S. 610.

⁴ U. S. Act, March 3, 1825, 4 Stat. at Large 109.

carefully guarded from all interceptors until their delivery to the addressees. "True," says Judge Curtis, "the mere opening of a letter by him who wrote it, and put it into the post-office is an innocent act. It may be done to correct a mistake, or for many proper reasons."⁵ But would it be a proper reason to take out money enclosed in a letter, the title to which vested in another from the time of mailing the letter, by reason of its delivery?

Can paper or money be attached during its transmission? The government cannot be factorized, but there is no law to prevent the garnishing of an express company, or other private agency. What can be thus secured? If it is money winging its way from a depositor to the bank or therefrom at his request, doubtless it can be held for his debt. If money is transmitted by a debtor to pay his debt the same principle doubtless would apply; if money were in process of transmission by a bank as agent it could be taken for the principal's debt, but not for a debt owing by the agent, for the obvious reason that it does not belong to him.

38. Revocation.

(a.) A check undelivered at the drawer's death is invalid,⁶ and cannot be endowed with life by his representatives.⁷ And unless there exists a different statutory rule,⁸ death⁹ or the

5 United States v. Pond, 2 Curt. (U. S.) 265, 269. See Chap. XVII. §5.

6 Drum v. Benton, 13 App. Cas. (D. C.) 245; McNamara v. McDonald, 69 Conn. 484. A pension certificate drawn to the order of a person then dead is absolutely void. United States v. First Nat. Bank, 82 Fed. 410.

7 Bromage v. Lloyd, 1 Ex. (Eng.) 32. See Clark v. Boyd, 2 Ohio 56, 60; Weiand v. State Nat. Bank, 112 Ky. 310.

8 In Mass. a drawee bank can pay a check within ten days of its date notwithstanding the drawer's death. Rev. Laws, Ch. 73, §17.

9 National Com. Bank v. Miller, 77 Ala. 168; Burke v. Bishop, 27 La. Ann. 465; Bernard v. Whitney Nat. Bank, 43 La. Ann. 50; Second Nat. Bank v. Williams, 13 Mich. 282; Fordred v. Seaman's Sav. Bank, 10 Abb. Pr. N. S. (N. Y.) 425; Saylor v. Bushong, 100 Pa. 23, 27; Simmons v. Cincinnati Sav. Society, 31 Ohio St. 457; Murphy v. Metropolitan Nat. Bank, 191 Mass. 159; Lawson v. Lawson, 1 P. Wms. 441; Hewitt v. Kaye, L. R. 6 Eq. 198; Tate v. Hilbert, 2 Ves. Jr. 118. See J. M. Zane's valuable article on this subject, 17 Harvard L. Rev. 104, Dec. 1903.

maker's failure¹⁰ operates as a revocation of a check except in those states wherein the assignment rule prevails.¹¹ Clearly a bank ought not to pay it after learning of this event, especially after a prohibition received from the depositor's administrator.¹² Nevertheless, a bank that pays without knowing of the drawer's death or failure is protected;¹³ otherwise it is liable to his estate.¹⁴ The reason for the rule is, the title to the estate by the drawer's death passes to his representatives and can be drawn only on their order. Of course, the debt, of which the check is evidence, if founded on a good consideration, is a valid claim against the drawer's estate.¹⁵

To the above rule there is an important limitation. A check for the entire amount of a deposit, wherever it operates as an equitable assignment, is not revoked by the drawer's death, because by the delivery of the check the title to the property is transferred and the transaction is closed.¹⁶

(b.) The drawer also, except in the states where the deposit is assigned by the transfer of his check,¹⁷ can revoke the payment of it,¹⁸ unless it has been certified.¹⁹ And when he has

¹⁰ *Guthrie Nat. Bank v. Gill*, 6 Okla. 560; *Laclede Bank v. Schuler*, 120 U. S. 511, 515.

¹¹ *Raesser v. National Ex. Bank*, 112 Wis. 591, 598; *Lewis v. International Bank*, 13 Mo. App. 202; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212.

¹² *Weiand v. State Nat. Bank*, 112 Ky. 310.

¹³ *Rogerson v. Ladbroke*, 1 Bing. (Eng.) 93.

¹⁴ *Pullen v. Placer Co. Bank*, 138 Cal. 169.

¹⁵ *Clay v. Layton*, 134 Mich. 317, 343.

¹⁶ *Foss v. Lowell Sav. Bank*, 111 Mass. 285. See Chap. XXII, §22.

¹⁷ *Loan & Sav. Bank v. Farmers' & Merch. Bank*, 54 S. E. (S. C.) 364; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531. Even in these States a check may be countermanded by the drawer when it was given without consideration. *First Nat. Bank v. Keith*, 84 Ill. App. 104, affd. 183 Ill. 475.

¹⁸ *People's Sav. Bank v. Lacey*, 40 So. (Ala.) 346; *National Bank v. Miller*, 77 Ala. 168; *Kahn v. Walton*, 46 Ohio St. 195; *Elder v. Franklin Nat. Bank*, 25 N. Y. Misc. 716, 718; *Egerton v. Fulton Nat. Bank*, 43 How. Pr. (N. Y.) 216; *Pullen v. Placer Co. Bank*, 138 Cal. 169, 172; *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 322, 326; *Florence Mining Co. v. Brown*, 124 U. S. 385, 391; *Morrell v. Wootten*, 16 Beav. (Eng.) 197;

thus acted, his bank is as much bound to respect his revocation as his original order.²⁰ If disregarded, he can hold the bank for the amount,²¹ which cannot recover from the payee if he knew nothing about the countermanded order.²² Finally, after the drawer has stopped payment, notice of presentment and non-payment is not needful to preserve his liability on the debt for which the check was drawn.²³

Banks sometimes make a regulation which is inserted in the pass-books of their depositors—that they will not be responsible for the execution of stop-payment orders. Such a by-law is valid when properly construed; in other words, is binding on the depositor and absolving the bank, unless it has been negligent in executing the order.²⁴ If it has not exercised ordinary care, no by-law can relieve a bank from liability.

It is said that a check is always supposed to be drawn on a deposit and is an absolute appropriation of the required amount to the holder, which is to remain there until demanded and cannot afterwards be withdrawn.²⁵ How can this principle be reconciled with the right of revocation? If the latter right be true, and it is just as firmly established as the other, it is evident that the former must be qualified. In other words, such an order is not an appropriation beyond the drawer's right of recall. Of course, the bank is not affected by either rule; both relate solely to the maker and holder of a check.

Weinholt v. Spitta, 3 Camp. (Eng.) 376. And the notice may be verbal. Lacey case, 40 So. 346.

²⁰ National Bank v. Berrall, 70 N. J. Law 757; Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322, 327.

²¹ Kahn v. Walton, 46 Ohio St. 195, 205, 206. See Freund v. Importers & Traders' Nat. Bank, 76 N. Y. 352.

²² Elder v. Franklin Nat. Bank, 25 N. Y. Misc. 716.

²³ Ibid.

²⁴ Purchase v. Mattison, 6 Duer (N. Y.) 587.

²⁵ Elder v. Franklin Nat. Bank, 25 N. Y. Misc. 716.

²⁵ Bell v. Alexander, 21 Gratt. (Va.) 1, 6; Deener v. Brown, 1 MacArthur (D. C.) 350; Newman v. Kaufman, 28 La. Ann. 865; Champion v. Gordon, 70 Pa. 474; Ex parte Brown, 2 Story (U. S.) 502; Conroy v. Warren, 3 Johns. Cas. (N. Y.) 259, 264; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 647. See Chap. XXVIII. §11.

(c.) The payment of a cashier's check cannot be countermanded, like that of an ordinary check, because the bank's obligation to pay it is like that of the maker of any other negotiable instrument payable on demand.²⁶

(d.) Under some conditions an order stopping the payment of a check is not effectual. Thus a maker of a check had it certified, but while on his way to the bank it was stolen. Though giving an order immediately for its non-payment, it was taken by a banker honestly, and collected from the drawee bank through the clearing-house. The payment bound both the maker and the bank.²⁷ Again, a check cannot be revoked wherever the equitable assignment rule prevails, and a check has been given for all, or a part of a specific fund.²⁸

39. Check Cannot be Presented After Drawee's Failure.

It need hardly be added that a check must be presented during the active life of the drawee. A presentation after the appointment of a receiver would be futile, even in those states where a check operates as an assignment.²⁹ In the latter, however, a different rule applies to the insolvency of the maker.³⁰

40. Conversion of Check by Former Owner.

The true owner of a lost or stolen check, endorsed in blank, who takes it from a bona fide purchaser to inspect and refuses to return it, is guilty of conversion.³¹ For, as the check is negotiable, the purchaser acquires a good title thereto against the payee to whom it was given.

26 Drinkall v. Movius State Bank, 11 N. Dak. 10.

27 Poess v. Twelfth Ward Bank, 43 N. Y. Misc. 45. But the banker, after the discovery of the theft, having repaid the money to the bank for the benefit of the maker, the maker was entitled to it. *Ibid.*

28 Pease & Dwyer Co. v. State Nat. Bank, 88 S. W. (Tenn.) 172. See *Fourth St. Bank v. Yardley*, 165 U. S. 634.

29 *Rouse v. Calvin*, 76 Ill. App. 362, 365.

30 See §38.

31 *Screiber v. Finan*, 28 N. Y. Misc. 560.

41. Credits by Bank Without Money to Pay Are Worthless.

All book crediting by a bank without corresponding funds to pay them is mere jugglery, and binds nobody.³² In like manner a cashier who, as assignee of an estate, transfers funds to the bank on its books, neither making, nor intending to make, any actual payments, of money, but only to hide, if possible, his irregularities, binds no one by his act; it is a fraud.³³

42. Consequences of Bank's Disregard of Depositor's Order to Pay. Damages.

A bank must honor its depositor's checks so long as his deposit is sufficient.³⁴ Failing to observe this rule, the bank becomes immediately³⁵ liable to a solvent depositor,³⁶ either in tort or assumpsit,³⁷ regardless of the holder's right of action, wherever the assignment doctrine prevails.³⁸ To lay the foundation for such an action a check must have been presented and refused, though this need not have been for his entire deposit.³⁹

That the bank is always liable for at least nominal damages

³² See Chap. XVI. §5b. Nor does crediting the payee of a worthless check with the amount always preclude the bank from disputing the validity of the credit. *Cox v. Hayes*, 18 Ind. App. 220.

³³ *Wiggins v. Stevens*, 33 N. Y. App. Div. 83.

³⁴ *Hawes v. Blackwell*, 107 N. C. 196; *Martin v. Minnekahta State Bank*, 7 S. Dak. 263; *National Mahwah Bank v. Peck*, 127 Mass. 298; *Carr v. National Security Bank*, 107 Mass. 45; *Fogarties v. State Bank*, 12 Rich. (S. C.) 518; *Saylor v. Bushong*, 100 Pa. 23; *Grammel v. Carmer*, 55 Mich. 201; *Merchants & Planters' Bank v. Meyer*, 56 Ark. 499; *National Bank v. Boles*, 12 Ky. L. Rep. 422; *Hopkinson v. Forster*, L. R. 19 Eq. (Eng.) 74.

³⁵ *O'Grady v. Stotts City Bank*, 106 Mo. App. 366; *Viets v. Union Nat. Bank*, 101 N. Y. 563; *Citizens' Nat. Bank v. Importers & Traders' Nat. Bank*, 44 Hun (N. Y.) 386.

³⁶ *Owen v. American Nat. Bank*, 81 S. W. (Tex. Civ. App.) 988. See article on the measure of damages in an action by a depositor against a bank for the wrongful dishonor of his check. 60 Cent. L. Jour. 144.

³⁷ *First Nat. Bank v. Shoemaker*, 117 Pa. 94; *Marzetti v. Williams*, 1 B. & Ad. (Eng.) 415; *Hopkinson v. Forster*, L. R. 19 (Eng.) 74.

³⁸ *National Bank v. Boles*, 12 Ky. L. Rep. 422.

³⁹ *Viets v. Union Nat. Bank*, 101 N. Y. 563.

all tribunals are in accord,⁴⁰ and also special damages when they are clearly proved.⁴¹ "Temperate" or general damages may be recovered when proof of special damages is lacking,⁴² and a large sum may be awarded for an injury to the drawer's credit.⁴³ To prove special damages the drawer may describe the conversations between himself and the representatives of business houses with whom he had been doing business, and from whom he sought to obtain credit after his check had been dishonored.⁴⁴

Malice need not be proved in order to recover,⁴⁵ and may be legally inferred from the repeated dishonor of the checks of the

40 Marzetti v. Williams, 1 B. & Ad. (Eng.) 415; Burroughs v. Tradesmen's Nat. Bank, 69 Hun (N. Y.) 202; First Nat. Bank v. Kansas Grain Co., 60 Kan. 30; Kleopfer v. First Nat. Bank, 65 Kan. 774.

41 Rolin v. Steward, 14 C. B. (Eng.) 595; First Nat. Bank v. Railsback, 58 Neb. 248.

42 Atlanta Nat. Bank v. Davis, 96 Ga. 334; Birchall v. Third Nat. Bank, 15 Pa. Week. Notes 174; Citizens' Nat. Bank v. Importers & Traders' Bank, 119 N. Y. 195, 202; Bank v. Goos, 39 Neb. 437; Schaffner v. Ehrman, 139 Ill. 109; Rolin v. Steward, 14 C. B. 595; Svendsen v. State Bank, 64 Minn. 40; J. M. James Co. v. Bank, 105 Tenn. 1; American Nat. Bank v. Morey, 113 Ky. 857, 863. For such a refusal a bank having ample funds belonging to the drawer is liable "for the natural and reasonable consequences of its act . . . Special damages also may be recovered if they are properly alleged." Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, citing among other cases, Prehn v. Royal Bank, L. R. 5 Ex. (Eng.) 92; Larios v. Bonany Y Gurety, L. R. 5 P. C. (Eng.) 346; Fleming v. Bank, L. R. App Cas., 1900 (Eng.) 577. Exemplary damages may be awarded. Wood v. American Nat. Bank, 100 Va. 306.

43 Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, and cases cited; Roe v. Bank of Versailles, 167 Mo. 406; Schaffner v. Ehrman, 139 Ill. 109; Patterson v. Marine Nat. Bank, 130 Pa. 419; Svendsen v. State Bank, 64 Minn. 40; Hopkinson v. Forster, L. R. 19 Eq. (Eng.) 74.

44 Metropolitan Supply Co. v. Garden City Bkg. & Trust Co., 114 Ill. App. 318.

45 Schaffner v. Ehrman, 139 Ill. 109. When the wrongful act is done intentionally without just cause or excuse, a legal inference of malice arises. In such a case general damages may be awarded. Davis v. Standard Nat. Bank, 50 N. Y. App. 210. But when the refusal is the result of a clerk's mistake, only nominal damages can be given. Clark v. Mt. Morris Bank, 85 N. Y. App. Div. 362.

depositor, possessing ample funds which are withheld from payment without reasonable excuse.⁴⁶

Physical suffering, if clearly proved, would doubtless constitute a good cause for damages, but a "nervous chill," super-induced theoretically by the bank's misconduct, is too remote for judicial consideration.⁴⁷

Besides damages, as above described, a bank by refusing to pay its depositor's check when having sufficient money for that purpose, subjects itself to the payment of interest on the amount until complying with the demand.⁴⁸

Lastly, the depositor's cause of action, on his insolvency, passes to his assignee for the benefit of his creditors.⁴⁹

43. Payment of Lost and Duplicate Checks.

Sometimes a check is lost and the holder requests the maker to give him another, who complies, writing thereon, "duplicate." By so doing a new obligation is not undertaken; the rights and duties of endorsers and other parties remain as before.⁵⁰ Consequently if the endorser on the original check has been discharged by the delay in presenting it, his liability is not renewed by endorsing the duplicate.⁵¹ Whether parol evidence can be introduced to show the making of a new or modified contract has received different answers. More frequently it has been excluded.⁵²

On learning that an attempted presentation by mail has failed, and that the check is lost, what action should the collect-

46 Davis v. Standard Nat. Bank, 50 N. Y. App. 210. But in Sprowl v. Southern Nat. Bank, 86 S. W. (Ky.) 1117, evidence of the previous dishonor of another check was held to be inadmissible.

47 American Nat. Bank v. Morey, 113 Ky. 857.

48 Helene v. Corn Ex. Bank, 96 N. Y. App. Div. 392.

49 Robinson v. Wiley, 188 Mass. 533.

50 Benton v. Martin, 40 N. Y. 346; Lewis v. Commercial Nat. Bank, 83 S. W. (Tex. Civ. App.) 422; Aebi v. Bank of Evansville, 124 Wis. 73.

51 Aebi v. Bank of Evansville, 124 Wis. 73. Equity has jurisdiction of an action on a lost check made to the maker's own order, and transferred for value without endorsement, the endorsee having only an equitable title. Moore v. Durnam, 63 N. J. Eq. 96.

52 Benton v. Martin, 40 N. Y. 346.

ing bank take? The Supreme Court of Wisconsin has recently answered that it is the duty of the bank "to at once make substitution, presentment and demand by means of a copy or sufficient description of the check, and in case of non-payment to give notice to the endorser."⁵³

Payment may be safely made by a bank to a bona fide purchaser of a lost check endorsed in blank by the payee.⁵⁴ Nor can he recover, though he had notified the bank of his loss.⁵⁵

44. Recovery from Depository of Proceeds of Check Fraudulently Obtained.

Can the drawer of a check fraudulently obtained recover the proceeds from the bank into which they have passed? Thus, the seller of goods deposited the check given in payment in a bank. Not having the goods sold, he bought them and drew on the buyer for the amount, and this draft the buyer was also obliged to pay to obtain the goods. While the buyer clearly had the right to sue the seller and attach any property belonging to him, he had no claim against the bank, where the check was deposited, as the possessor of the buyer's specific property.⁵⁶

45. Payment to Conflicting Claimants. Interpleader.

(a.) Not infrequently two or more parties claim the same deposit or other property in the bank's possession, and a bill of interpleader is brought by the bank to compel the claimants to litigate and determine their rights. The reason for the remedy is not so much the danger of two recoveries against the bank for the same thing, as to end the vexation and expense attending such a controversy.⁵⁷ The action lies only when several

53 Aebi v. Bank of Evansville, 124 Wis. 73; Smith v. Rockwell, 2 Hill (N. Y.) 482; Hinsdale v. Miles, 5 Conn. 331. See Moody v. Mack, 43 Mo. 210.

54 Unaka Nat. Bank v. Butler, 113 Tenn. 574, and cases cited.

55 Ibid.

56 T. S. Reed Grocery Co. v. Canton Nat. Bank, 100 Md. 299. See note on this case, 70 L. R. A. 959.

57 Livingstone v. Bank of Montreal, 50 Ill. App. 562, 566; Fidelity Fire

defendants stand in the same relation to the bank, asserting severally the same right.⁵⁸

(b.) In such cases a bank may maintain a bill against conflicting claimants for the same deposit;⁵⁹ certificate of deposit;⁶⁰ collateral security;⁶¹ coin;⁶² stock;⁶³ deposit in a safe-deposit company;⁶⁴ or public deposit claimed by different officials.⁶⁵

(c.) To justify an interpleader the same debt must be claimed by two or more claimants; all adverse titles must be derived from a common source; the complainant seeking relief must have no interest therein; nor question the full amount claimed by either party; nor be able to determine without hazard to which of the defendants the thing of right belongs.⁶⁶

Ins. Co. v. Ill. Trust & Sav. Bank, 110 Ill. 92; *Harris Bkg. Co. v. Miller*, 190 Mo. 640; *First Nat. Bank v. Beebe*, 62 Ohio St. 41; *National Park Bank v. Lanahan*, 60 Md. 477, 514; *Phila. Sav. Fund Society v. Clark*, 11 Pa. Week. Notes 118. See valuable note in 2 *Silvernail* (N. Y.) 347.

58 *Wells, Fargo & Co. v. Miner*, 25 Fed. 533.

59 Chaps. XXI. §18, XXVIII. §16; *Harrisburg Nat. Bank v. Hiester*, 2 Pearson (Pa.) 255; *Bank v. McClure*, 104 Tenn. 607; *Pratt v. Myers*, 18 N. Y. Supp. 466; *Platte Valley State Bank v. National Live Stock Bank*, 155 Ill. 250, affg. 54 Ill. App. 483; *Fairfield Sav. Bank v. Small*, 90 Me. 546; *People's Sav. Bank v. Look*, 95 Mich. 7.

60 Chap. 14. §15; *Harris Bkg. Co. v. Miller*, 190 Mo. 640.

61 *Bristol Sav. Bank v. Holley*, 77 Conn. 225.

62 *Dickeschied v. Exchange Bank*, 28 W. Va. 340.

63 *Providence Bank v. Wilkinson*, 4 R. I. 507; *Dickerson v. Griggsville Nat. Bank*, 209 Ill. 350. If a certificate of bank stock is not to be delivered by the bank to the assignee until the assignor's death, the bank by issuing a duplicate certificate to the assignee and permitting him to vote at elections, is not estopped to require him to interplead when the stock is claimed by other parties and defend his title. *Ibid.*

64 *Mercantile Safe Deposit Co. v. Dimon*, 25 N. Y. Supp. 388.

65 *German Ex. Bank v. Commissioners*, 6 Abb. N. C. (N. Y.) 394.

66 *Wells, Fargo & Co. v. Miner*, 25 Fed. 553; *Hathaway v. Foy*, 40 Mo. 540; *Arnold v. Sedalia Nat. Bank*, 100 Mo. App. 474; *Bath Sav. Institution v. Fogg*, 63 At. (Me.) 731; *National Park Bank v. Lanahan*, 60 Md. 477, 514; *Phila. Sav. Fund Society v. Clark*, 11 Pa. Week. Notes 118; *Crane v. McDonald*, 118 N. Y. 648; *Sioux Falls Sav. Bank v. Lien*, 14 S. Dak. 410, 424; *Du Bois v. Union Dime Sav. Institution*, 89 Hun (N. Y.) 383; *Progressive Handlanger Union v. German Sav. Bank*, 25 J. & S. (N. Y. Superior) 594; *Helene v. Corn Exchange Bank*, 96 N. Y. App. Div. 392, 395.

"And he must bring the money or thing claimed into court, so that he cannot be benefitted by the delay of payment which may result from the filing of the bill."⁶⁷

(d.) Various changes, both in the fundamental law on which interpleader is founded, and also in the mode of procedure, have been effected by statute and judicial decision.⁶⁸ In New York it has been declared that "the old rule that a stockholder is entitled to be removed beyond the shadow of a risk, and that in order to entitle him to the protection of the court it is only necessary to establish that suits have been brought or that claimants have threatened to bring them, no longer prevails, and it is now necessary to prove that such claim has some reasonable foundation, and that there exists some reasonable doubt as to whether or not the stakeholder would be reasonably safe in paying over the money."⁶⁹

(e.) The action may always be a twofold contest: First, the plaintiff's right to bring the suit and to force the defendants to interplead.⁷⁰ For some reasons this right will be withheld. Thus a bank holding property as bailee is not entitled to call on a party to interplead concerning the right thereto when he had no connection therewith, or the bank's possession, if not tortious at its inception became so after demand and refusal.⁷¹ Again, a company may deposit money in a bank that may be garnished, and yet seek by suit to recover from the bank the money. On such an occasion a bank filed a bill of interpleader, which was declared to be needless, because the court

67 Sioux Falls Sav. Bank v. Lien, 14 S. Dak. 410, 424.

68 In Conn. by statute of 1893, the common law was changed whereby the bill could be maintained only by a stakeholder who had no interest in the fund. Union Trust Co. v. Stamford Trust Co., 72 Conn. 86. See Helene v. Corn Exchange Bank, 96 N. Y. App. Div. 392.

69 Cosgriff v. Hudson City Sav. Institution, 24 N. Y. Misc. 4; Mars v. Albany Sav. Bank, 64 Hun (N. Y.) 424; Nassau Bank v. Landes, 44 Hun 58.

70 Gardiner Sav. Institution v. Emerson, 91 Me. 535, 537; San Francisco Sav. Union v. Long, 123 Cal. 107, 109. See Fletcher v. Troy Sav. Bank, 14 How. Pr. (N. Y.) 383.

71 First Nat. Bank v. Bininger, 26 N. J. Eq. 345.

had ample power to protect the bank from a double claim by a stay of execution until the end of the garnishee proceedings.⁷²

Second, if the suit is maintained, then the plaintiff is discharged from all liability to either party, the claimants are directed to interplead, and the plaintiff ceases to be a party to the litigation.⁷³

After an action has been begun by a claimant to recover a deposit, the bank should not delay to bring its bill of interpleader until the rendition of the judgment, but any time before will suffice.⁷⁴

(f.) Wherever the assignment rule prevails a different rule applies to a bank. It has no right to deposit in court the money whose ownership is disputed and require the drawer to litigate with the holder of the check, and thus ascertain for the bank to whom the money shall be paid. It is the drawer's duty to ascertain a judicial answer; while the bank may indeed wait a reasonable time before paying for him to take such action.⁷⁵

(g.) Lastly, when the bill is properly filed the complainant, after his discharge, is entitled to his costs out of the fund deposited with the court, if it consists of money.⁷⁶

46. Payment Through Clearing-House.

(a.) Payments are effected, especially in the larger cities, through an association called a clearing-house. This is organized and operated by the associated banks, and, besides clearing their checks, on rare occasions issues certificates which are used for the payment of balances, but which do not pass into general

⁷² Livingstone v. Bank of Montreal, 50 Ill. App. 562.

⁷³ Gardiner Sav. Institution v. Emerson, 91 Me. 535, 537; Fairfield Sav. Bank v. Small, 90 Me. 546, 548; San Francisco Sav. Union v. Long, 123 Cal. 107, 109.

⁷⁴ Union Bank v. Kerr, 2 Md. Ch. 460; Provident Institution v. White, 115 Mass. 112; Sioux Falls Sav. Bank v. Lien, 14 S. Dak. 410.

⁷⁵ Loan & Sav. Bank v. Farmers' & Merch. Bank, 54 S. E. (S. C.) 364.

⁷⁶ Wayne Co. Sav. Bank v. Airey, 95 Mich. 520; Rahway Sav. Institution v. Drake, 25 N. J. Eq. 220; First Nat. Bank v. West River R., 46 Vt. 633. But see Cosgriff v. Hudson City Sav. Institution, 24 N. Y. Misc. 4, 9.

circulation.⁷⁷ It is not in any sense a mutual bank;⁷⁸ a national bank therefore does not transcend its authority in joining such an association.⁷⁹ Furthermore, it cannot bind by rule or usage other banks not belonging to the association.⁸⁰ It is simply a convenient method of making collections and payments as between its members, while an outsider is neither benefitted nor injured by its action.⁸¹ Says the Supreme Court of Massachusetts: "To the regulations of this association the customers of the banks are not parties, and, whatever effect is to be given to them as between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them."⁸² The collection of a check, note or other instrument by the clearing-house method is an addition to the collector's assets.⁸³

(b.) While all members have equal rights and privileges, they may also clear for other banks by complying with rules adopted for that purpose.⁸⁴ Such an arrangement, when existing, possesses a twofold nature, one between the non-member and the bank clearing therefor, and another between the latter bank and the clearing-house. The clearing bank requires of the other adequate security for clearing its checks and other obligations as a protection to itself and the other clearing-house members.⁸⁵ But by undertaking this agency

77 For a description of the mode of clearing, see Bolles's Practical Banking, Part III, 11th Ed. See note, 25 L. R. A. 824.

78 Crane v. Fourth St. Nat. Bank, 173 Pa. 566. See Philler v. Patterson, 168 Pa. 468.

79 Philler v. Patterson, 168 Pa. 468.

80 Overman v. Hoboken City Bank, 30 N. J. Law 61.

81 People v. St. Nicholas Bank, 77 Hun (N. Y.) 159.

82 Merchants' Nat. Bank v. National Bank of North America, 139 Mass. 513, 518; citing Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281; Bank v. Bangs, 106 Mass. 441; Manufacturers' Bank v. Thompson, 129 Mass. 438; Exchange Bank v. Bank of North America, 132 Mass. 147.

83 Kansas State Bank v. First State Bank, 62 Kan. 788, revg. 9 Kan. App. 839.

84 National City Bank v. New York Gold Ex. Bank, 101 N. Y. 595; Stuyvesant Bank v. National Mech. Bkg. Assn., 7 Lans. (N. Y.) 197.

85 O'Brien v. Grant, 146 N. Y. 163.

the clearing bank does not assume the relation existing between the non-member and its depositors.⁸⁶

On the other hand, neither the non-clearing-house bank, nor its representatives, nor creditors can escape from obligations rightfully and knowingly contracted by itself or by its agent. Thus a bank was permitted to clear for another under an arrangement which the non-member could not discontinue without previous notice, which, when given, was not to take effect until a prescribed time,—enough to inform all the members of the association of its action. This notice was effective, notwithstanding the failure of the non-member, thereby giving to the members of the association having checks thereon a preference over other creditors by reason of the security held by the clearing agent of the failed bank to secure the clearing-house members.⁸⁷

(c.) The rules and usages of the clearing-house association, not in conflict with the law, have essentially the force of law among their members.⁸⁸ Many of the legal controversies that have arisen between clearing-house banks have turned on the construction that should be put on the clearing-house regulations. Those most frequently the subject of controversy have pertained to the time for correcting errors and returning paper. More than once errors have not been discovered and reclamations demanded until after the hour specified for so doing; nevertheless an attempt has been made to recover as though no clearing-house rule was in the way, or did not apply.⁸⁹ Thus a rule of the Philadelphia clearing-house,—on the discovery of bad or informal checks received in the morning exchanges they must be returned by noon of the same day—does not apply to

86 *Grant v. MacNutt*, 12 N. Y. Misc. 20.

87 *O'Brien v. Grant*, 146 N. Y. 163.

88 *German Nat. Bank v. Farmers' Dep. Nat. Bank*, 118 Pa. 294, 314; *Overman v. Hoboken City Bank*, 30 N. J. Law 61; *Louisiana Ice Co. v. State Nat. Bank, McGloin (La.)* 181; *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438; *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159.

89 *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281.

Contra.—Preston v. Canadian Bank of Commerce, 23 Fed. 179.

forged paper;⁹⁰ while another rule specifying the time for adjusting errors does not apply to an overdrawn account.⁹¹

Again, the time rule for returning checks does not include those which are not returned because of a mistake of fact discovered after the time prescribed for returning them.⁹² In like manner entries of checks, cuts, or other marks may, under clearing-house rules, constitute a conditional, but not an absolute acceptance, and consequently do not prevent their return nor raise an absolute liability to pay for them.⁹³

(d.) A temporary rule, or one that is not regularly enforced, has not the same force as a permanent one. Thus, by a clearing-house rule, a check for which there was no funds must be returned to the presenting bank before noon on the day of presentation. But the rule was temporary and not usually followed. It could not, therefore, derogate from the ordinary rule of law applying to the return of checks drawn on insufficient funds.⁹⁴

(e.) Before sending checks for clearing, some clearing-houses require their endorsement. What is the effect of an endorsement made in compliance with this rule? A bank, for example, receives from one of its customers a check payable to his order, drawn by one bank on another, which has been raised and credited provisionally for the raised amount. The bank, by endorsing it, "Pay only through clearing-house," is regarded simply as a holder for collection, and is not liable on the check as a general endorser.⁹⁵ Indeed, by this act it has undertaken no other liability or warranty than that imposed by the clearing-house rules. Furthermore, if these are not observed by the bank on which the check is drawn and paid, it cannot

90 *Corn Ex. Nat. Bank v. National Bank of the Republic*, 78 Pa. 233.

91 *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 435.

92 *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513; *Atlas Nat. Bank v. National Ex. Bank*, 176 Mass. 300, 307. See *National Ex. Bank v. National Bank*, 132 Mass. 147.

93 *German Nat. Bank v. Farmers' Dep. Nat. Bank*, 118 Pa. 294.

94 *LaBanque Nationale v. Merchants' Bank*, 7 Mont. Super. Ct. (Can.) 336.

95 *Crocker Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564.

recover from the endorsing bank which had meanwhile paid the money in good faith to the customer.⁹⁶

(f.) Suppose a bank, after sending its checks to the clearing-house and before they have been cleared, fails, what are the rights of all interested parties? The clearing-house rules generally provide for such an happening. Recently the highest federal tribunal declared that a bank receiving from a clearing-house proceeds of checks presented by a member shortly before its suspension and settlement of them, must return them to its representative, the receiver.⁹⁷

On one occasion an attempt was made to apply the checks thus sent in payment of the checks presented on the same day to the clearing-house, but did not succeed. The lower court did indeed permit an application to be made in payment of the checks presented that had been certified, but the court of review said that it was proper for the receiver to take possession of the checks of the failed bank in the possession of the clearing-house, and that all the checkholders must share alike regardless of their certification.⁹⁸ In other words, the sending of checks through the clearing-house on a certain day for collection is not an appropriation of them as a specified fund for the payment of checks, certified or uncertified, drawn by the bank's customers on the previous day; the checks are sent for the purpose of collection, not of appropriation.⁹⁹

On another occasion a Philadelphia bank that was indebted to a New York bank remitted in payment its cashier's check on another New York bank which was duly presented and paid through the clearing-house. The transaction constituted such a complete appropriation of the fund to the creditor bank that its ownership was not affected by restoring temporarily the money to the drawee bank after its demand on learning of the

96 Ibid.

97 Rector v. City Deposit Co., 200 U. S. 405 and 420.

98 People v. St. Nicholas Bank, 77 Hun (N. Y.) 159.

99 Ibid, 174.

drawer's suspension, in accordance with a rule of the clearing-house, well understood by both institutions.¹

(g.) The effect of a settlement between two clearing-house banks may next be considered. Such action which is completed by striking a balance between their accounts is final and conclusive when either fails to give notice of its inability to respond to the demand of the other before the hour that banks usually pay checks to the credit of their customers.² The mutual credits thus given cannot be recalled by either to the other's detriment.³

(h.) In an action by one clearing-house bank against another to recover back the amount of a check paid through the clearing-house under a mistake of fact, caused by the drawer's fraud, the measure of damages is the difference between the amount of the check and the amount for which he was entitled to draw.⁴

(i.) Besides checks, notes are often cleared through these associations, and legal controversies have arisen concerning them. In one of these it was ruled that a well-known custom among the members of such an association that if notes included in a clearing-house settlement which proved to be not good must be returned before the time of clearing the paying

1 *National Union Bank v. Earle*, 93 Fed. 330. A bank drew a check on B bank which was delivered to C bank, a non-member of the clearing house, which sent it to D bank, its clearing house agent with a dated endorsement, "for deposit, clearing house." Before noon, on the day of sending it to the clearing house, the C bank failed and the drawer notified the drawee not to pay it. The D bank brought suit against the drawee to recover the amount, and it was held that the drawer had a right to notify the drawee to stop payment, and that the D bank, having received the check for collection only, had no right of action against the drawee. *German Nat. Bank v. Farmers' Dep. Nat. Bank*, 118 Pa. 294. A bank which guaranteed the payment of checks of a non-clearing house bank in order to clear them became, after its failure, the assignee of a check thus guaranteed with the right to recover thereon against the drawer. *Volts v. National Bank*, 158 Ill. 532, affg. 57 Ill. App. 360. Even if a national bank had no authority to guarantee the check, this is not a defence which the drawer can interpose against the bank that has paid his check. *Ibid.*

2 *Blaffer v. Louisiana Nat. Bank*, 35 La. Ann. 251.

3 *Ibid.*

4 *MERCHANTS' NAT. BANK v. NATIONAL BANK*, 139 Mass. 513.

bank, otherwise the payment would become absolute—precluded a return and recovery at a later period.⁵

But if a note is paid through the clearing-house by mistake, the paying bank supposing the maker has ample funds, and the discovery is soon made and all steps are taken in due time to preserve the rights of the paying bank, it can recover the amount from the other.⁶

Suppose a check deposited by a stranger is sent through the clearing-house and paid without informing the drawee of the character of the depositor, is this such negligence as will throw the loss, should any happen, on the former bank? To this question a negative answer has been given.⁷

5 *Atlas Nat. Bank v. National Ex. Bank*, 176 Mass. 300, and 178 Mass. 531.

6 *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438.

7 *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11.

CHAPTER XXI.

PAYMENT OF SAVINGS BANK DEPOSITS.

<ol style="list-style-type: none">1. Amount that may be received.2. Relation of bank to depositor.3. Same subject.4. Relation of directors to general depositors.5. Relation of bank to special depositor.6. Conclusiveness of records relating to deposits.7. Care required in paying deposits.8. Regulations for paying deposits.<ol style="list-style-type: none">a. When they form a contract.b. Must give notice of withdrawal.c. Payment to another on presentation of book, or written order with book.d. Identification.e. Cases of negligence.9. Payment to lost book depositor. Bond of indemnity.10. Payment to administrators, executors, etc.<ol style="list-style-type: none">a. Administrator must produce book.b. Payment is no protection if illegally appointed.	<ol style="list-style-type: none">c. His right to trust deposits.d. His right to recover a deposit fraudulently transferred.e. Rules for paying representatives of deceased depositors.f. Payment to foreign administrator.g. Payment to administrator appointed by depositor. <ol style="list-style-type: none">II. Payment to joint depositors.<ol style="list-style-type: none">a. Alternative deposits.b. Husband as agent for his wife.c. Husband's deposits in wife's name.12. Payment to joint depositors who are mutual contributors.13. Payment of deposit kept in another's name without bank's knowledge.14. Deposit may be assigned.15. Payment through the mail.16. Attachment of deposits.17. Actions to recover deposits.18. Action of interpleader.
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1. Amount That May be Received.

Unlike a bank of discount, savings banks are often restricted in the amount of deposits they can annually, or in the aggregate, receive from a depositor. This restriction is imposed sometimes by charter, more frequently by by-law. The object of the restriction is to confine the scope of these institutions to individuals possessing small means, especially the working

classes; merchants, corporations and the like must keep their deposits elsewhere. A depositor who violates this regulation is not prevented from recovering the full amount of his deposit, but not the interest earned on the excess.¹

2. Relation of Bank to Depositor.

Though the relationship between a savings bank depositor and his bank is said to be that of debtor and creditor,² in many states the relationship differs from that existing between banks of discount and their depositors. Should a discount bank lose ever so much of its capital, yet it would be obliged to respond to a depositor so long as there was any remaining. Not so a savings bank. Should it be overtaken with a loss, it can apportion the remainder of its funds among its depositors; no one can compel payment in full to the disadvantage of the others.³ But so long as the doors of a savings bank remain open, a depositor can demand and obtain his deposit, regardless of the losses the bank may have sustained.⁴

3. Same Subject.

Again, after the failure of a savings bank the courts differ concerning the rights of the general depositors as creditors. By one view general depositors are likened to the stockholders of a discount bank and have no claim on their deposits until all

1 Taylor v. Empire State Sav. Bank, 66 Hun (N. Y.) 538.

2 People v. Mechanics' Sav. Institution, 92 N. Y. 7; Van Dyck v. McQuade, 86 N. Y. 38, 47; Ladd v. Androscoggin Co. Sav. Bank, 96 Me. 520; Robinson v. Aird, 43 Fla. 30; Ward v. Johnson, 95 Ill. 215; Ide v. Pierce, 134 Mass. 260; Pope v. Burlington Sav. Bank, 56 Vt. 284, 289. See Stockton v. Mechanics' & Lab. Sav. Bank, 32 N. J. Eq. 163; Zinn v. Mendel, 9 W. Va. 580. "In savings banks, the deposits, though called such, are strictly loans, on which interest is paid, and are paid only on express and specific notice." Corwin v. Urbana Mutual Ins. Co., 14 Ohio 6, 12. See Chap. I, §6 and VII, §30.

3 Osborne v. Byrne, 43 Conn. 155; Bunnell v. Collingsville Sav. Society, 38 Conn. 203; Coite v. Society for Savings, 32 Conn. 173; Simpson v. City Sav. Bank, 56 N. H. 466; Cogswell v. Rockingham Sav. Bank, 59 N. H. 43; Lewis v. Lynn Institution, 148 Mass. 235.

4 Makin v. Institution for Savings, 23 Me. 350.

the bank's indebtedness including the special deposits are paid.⁵ By the other view general depositors share with all creditors, except perhaps the special depositors.⁶ The distinction is important for, by the latter view, a depositor may set off his indebtedness to the bank against his deposit;⁷ by the former view he cannot.⁸

4. Relation of Directors to General Depositors.

Though the bank, during solvency, is a debtor, the directors in keeping, lending and returning deposits are regarded as trustees and the depositors as beneficiaries.⁹ The distinction is not only true, but important, for, should a bank fail, the depositors may have against the directors or trustees a remedy which would otherwise be denied to them.¹⁰

5. Relation of Bank to Special Depositor.

A savings bank that receives a special deposit is an agent and not a debtor. One of the consequences of this distinction is, should the bank fail, such a depositor must be paid in preference to the general depositors.¹¹ Even though a bank had no

5 Cogswell v. Rockingham Sav. Bank, 59 N. H. 43, 44; Stockton v. Mechanics' & Lab. Sav. Bank, 32 N. J. Eq. 163. When solvent, the depositors are in the nature of partners or stockholders; when insolvent, they are creditors. In all cases they are beneficiaries in their relation to the managers. Barrett v. Bloomfield Sav. Institution, 64 N. J. Eq. 425.

6 People v. Mechanics' Sav. Bank, 92 N. Y. 7.

7 New Amsterdam Sav. Bank v. Tartter, 4 Abb. N. C. (N. Y.) 215. See Van Dyck v. McQuade, 85 N. Y. 616; Robinson v. Aird, 43 Fla. 30.

8 Osborne v. Byrne, 43 Conn. 155; Barnstable Sav. Bank v. Snow, 128 Mass. 512; Cogswell v. Rockingham Sav. Bank, 59 N. H. 43; Stockton v. Mechanics' & Lab. Sav. Bank, 32 N. J. Eq. 163; Hannon v. Williams, 34 N. J. Eq. 255.

9 Makin v. Institution for Savings, 23 Me. 350; Dickson v. Kittson, 75 Minn. 168; Stockton v. Mechanics' & Lab. Sav. Bank, 32 N. J. Eq. 163; Newark Sav. Institution Case, 28 N. J. Eq. 552. See Chap. VIII. §40.

10 Williams v. McKay, 40 N. J. Eq. 189, revg. 38 N. J. Eq. 373; Hun v. Cary, 82 N. Y. 65. See Spearing's Appeal, 71 Pa. 11.

11 Cogswell v. Rockingham Ten Cents Sav. Bank, 59 N. H. 43; Heironimus v. Sweeney, 83 Md. 146.

Contra.—Stockton v. Mechanics' & Lab. Sav. Bank, 32 N. J. Eq. 163.

authority to receive a special deposit, this rule would be applied on the occasion of its failure.¹²

6. Conclusiveness of Records Relating to Deposits.

The entries on the depositor's book and the books kept by a banker are not conclusive evidence of the ownership of the deposits thus recorded.¹³ Hence the entries may be attacked as we have elsewhere described. But the book may be used to show the sums deposited.¹⁴

7. Care Required in Paying Deposits.

A depositor may by agreement somewhat relieve the bank and its officers from liability, but how far he can do this has not been determined.¹⁵ Unquestionably, no agreement contravening the constitution and statutes of the state would be valid. Nor could the terms even of such an agreement be regarded as known by one who merely signed a book containing them, or a release from them.¹⁶

While a bank may guard its action in paying deposits in all reasonable ways, by no rule can it relieve itself from the exercise of ordinary care and diligence.¹⁷ The latest statement of the rule by the highest court of New York may be given: "The only practicable general rule to which savings banks can be safely held in such dealings is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case."¹⁸ And a bank that promises to use its "best efforts" to prevent fraud, establishes a

¹² *Ibid.*

¹³ *Kennebec Sav. Bank v. Fogg*, 83 Me. 374. See Chap. XV. §4.

¹⁴ *Brown v. Abingdon Sav. Bank*, 119 Mass. 69.

¹⁵ *French v. Teschemaker*, 24 Cal. 518, 558, 559; *Wells v. Black*, 117 Cal. 157.

¹⁶ *Wells v. Black*, 117 Cal. 157.

¹⁷ *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, revg. 88 App. Div. 374; *Appleby v. Erie Co. Sav. Bank*, 62 N. Y. 12; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488.

¹⁸ *Kelley v. Buffalo Sav. Bank*, 180 N. Y. 171, 178.

still higher standard of skill and vigilance, which it must observe.¹⁹

Keeping this most general rule of care and diligence in sight, a bank may, by by-laws, relieve itself of greater responsibility.²⁰ "And in the absence of any rules assented to by its customers, a savings bank is to be governed by the same legal principles which apply to other moneyed institutions. When it has prescribed rules, and its depositor has assented to them, they are the agreement, and each party must keep it, to preserve rights against each other."²¹

8. Regulations for Paying Deposits.

In paying deposits, savings banks, by reason of peculiar difficulties, especially similarity in the names and ages of many of their depositors, have established rules in the form of by-laws, which their depositors must regard.²² Unless they are unreasonable,²³ these are binding on both bank and depositor as truly as if established by agreement in a more formal manner.²⁴ By no rule can a bank absolve itself from negligence; for this banks are everywhere responsible.

(a.) The by-laws or regulations fixing the relations between bank and depositor usually are formally adopted by the

19 Allen v. Williamsburg Sav. Bank, 69 N. Y. 314.

20 Israel v. Bowery Sav. Bank, 9 Daly (N. Y.) 507; Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418.

21 Folger, J., Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314, 321.

22 Langdale v. Citizens' Bank, 121 Ga. 104; Ladd v. Augusta Sav. Bank, 96 Me. 510; Chase v. Waterbury Sav. Bank, 77 Conn. 296. In New York, by statute Laws, 1892, Chap. 689, savings bank deposits may be repaid under such regulations as the trustees may prescribe. There "shall be evidence between the corporation and the depositors of the terms upon which the deposits are made." Campbell v. Schenectady Sav. Bank, 114 N. Y. App. Div. 337.

23 See Chap. III. §§4, 5.

24 Warhus v. Bowery Sav. Bank, 21 N. Y. 543, affg. 5 Duer 67; Apbleby v. Erie Co. Sav. Bank, 62 N. Y. 12; Chase v. Waterbury Sav. Bank, 77 Conn. 295; Langdale v. Citizens' Bank, 121 Ga. 105; Gifford v. Rutland Sav. Bank, 63 Vt. 108.

bank.²⁵ But they need not be in writing, and their adoption may be as clearly shown by their long use with the knowledge and approval of the trustees²⁶ as by an express vote of adoption in a meeting. In like manner it has been declared that a by-law may die through long continued disregard by the life-giving power.²⁷

Such by-laws, to have the binding force of a contract with depositors, must receive, in some way, their assent. All authorities agree that depositors who know of them and make no objection thereto are bound,²⁸ unless they are unreasonable.²⁹ But are depositors bound who have not received *actual* knowledge? Generally, they are regarded as having knowledge on receiving and retaining their pass-books containing them,³⁰ whether they can read or not.³¹ The courts that maintain the extreme view contend that those who cannot read because of their blindness, ignorance, or lack of knowledge of the tongue

25 Chap. III. §§1-6.

26 Ladd v. Augusta Sav. Bank, 96 Me. 510; Bank v. Pinson, 58 Miss. 421, 429.

27 Ladd v. Augusta Sav. Bank, 96 Me. 510.

Contra.—Campbell v. Watson, 62 N. J. Eq. 396, 423.

28 See Chap. III. §1.

29 See Chap. III. §§1, 4, 5.

The rule of care is observed by a bank that receives from the presentor of a bank correct answers to all the test questions pertaining to identification. Ferguson v. Harlem Sav. Bank, 43 N. Y. Misc. 10.

30 Gifford v. Rutland Sav. Bank, 63 Vt. 108; Heath v. Portsmouth Sav. Bank, 46 N. H. 78; Eaves v. People's Sav. Bank, 27 Conn. 229; Chase v. Waterbury Sav. Bank, 77 Conn. 295; Burrill v. Dollar Sav. Bank, 92 Pa. 134; Goldrick v. Bristol Co. Sav. Bank, 123 Mass. 320; Donlan v. Provident Institution, 127 Mass. 183; Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418; Smith v. Brooklyn Sav. Bank, 101 N. Y. 58; Appleby v. Erie Co. Sav. Bank, 62 N. Y. 12, 17; Allen v. Williamsburg Sav. Bank, 69 N. Y. 314; Wilcox v. Onondaga Co. Sav. Bank, 40 Hun (N. Y.) 297, 302; Gammond v. Bowery Sav. Bank, 15 Daly (N. Y.) 483, 484; Cosgrove v. Provident Institution, 64 N. J. Law 653.

31 Burrill v. Dollar Sav. Bank, 92 Pa. 134; Donlan v. Provident Institution, 197 Mass. 183; Warhus v. Bowery Sav. Bank, 21 N. Y. 543. A depositor who cannot read should have the rules read to him. *Ibid.* See Geitelsohn v. Citizens' Sav. Bank, 17 N. Y. Misc. 574, 579. On the contrary see Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418.

in which they are written should ask some friend to read the regulations to them.³² A smaller number of tribunals hold that a bank's duty is not fully done by simply giving a depositor his pass-book containing the regulations; it is the bank's duty to call his attention to them.³³

Again, while a by-law known by a depositor at the time of making a deposit defines his legal relation with the bank, he remains unaffected by any subsequent amendment of which he has no knowledge.³⁴ But if, at the time of thus establishing legal relations with the bank, he accepts a by-law promising to become bound by future amendments, whether receiving notice of them or not, he would be affected by all reasonable changes adopted for the welfare of the bank and its customers.³⁵

(b.) One of the regulations requires a depositor to give notice of his intended withdrawal of his deposit. This is a proper requirement, and must be given unless the bank suspends³⁶ or refuses to pay a deposit, on the ground that it has already paid the deposit.³⁷ Besides protecting the bank, the rule is a protection to depositors against fraud and forgery. Though such a rule usually exists, there is no legal presumption of its existence, consequently a depositor need not aver, in an action to recover his deposit, that he was entitled thereto without giving notice of his intention to withdraw his money.³⁸

³² *Ibid.*

³³ *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175. In *Ladd v. Augusta Sav. Bank*, 96 Me. 510, 513, a well considered case, the court said: "If a depositor receives from the bank a bankbook containing rules, regulations and conditions which affect his contractual relations with the bank and its liability to him, clearly printed therein, and reads them so that he knows of their existence, and continues to leave his deposit in the bank . . . he must be presumed to have agreed to be bound by them."

³⁴ *Kimins v. Boston Sav. Bank*, 141 Mass. 33. See *Hudson v. Roxbury Institution*, 176 Mass. 522.

³⁵ *Ibid.*

³⁶ *Lanz v. Fresno Loan & Sav. Bank*, 125 Cal. 456; *Mitchell v. Beckman*, 64 Cal. 117.

³⁷ *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242; *Townsend v. Webster Five Cents Sav. Bank*, 143 Mass. 147; *Abramowitz v. Citizens' Sav. Bank*, 17 N. Y. Misc. 297.

³⁸ *Weld v. Eliot Five Cents Sav. Bank*, 158 Mass. 339.

(c.) Another regulation requires the presentation of the pass-book simultaneously with the demand for the deposit.³⁹ This requirement is very general and is founded on sound reason. The bank, on its presentation, is protected in paying the presentor, unless it was negligent in paying, even though the truth should subsequently appear that it paid to a thief.⁴⁰

After making payment to a wrong person, sooner or later the rightful owner, or if dead, his representative, will appear and claim the deposit. He seeks to recover by showing that the bank was negligent; it defends by proving, as it usually can, the use of reasonable care. The inquiry is one of fact; as the claimant has nothing to lose, unless it be an attorney's fee and perhaps not that, the cases of an attempted recovery are very numerous.

Another rule provides for paying a deposit to another on the written order of the depositor accompanied with his book. When thus paying, exercising proper care, the bank is not liable, though the fact subsequently appears that it paid to the wrong person, or on a forged order.⁴¹ Furthermore, such an order is good though the month and day of the month be omitted.⁴²

Again, this rule prescribing the mode of paying deposits to

39 Eaves v. People's Sav. Bank, 27 Conn. 229.

40 Ibid.

41 Cosgrove v. Provident Institution, 64 N. J. Law 653, revg. *Ibid.* 39; Gifford v. Rutland Sav. Bank, 63 Vt. 108; Eaves v. People's Sav. Bank, 27 Conn. 229; Kelly v. Emigrant Ind. Sav. Bank, 2 Daly (N. Y.) 227; Ap-pleby v. Erie Co. Sav. Bank, 62 N. Y. 12; Langdale v. Citizens' Bank, 121 Ga. 105.

Cases of negligence in paying. Kummel v. Germania Sav. Bank, 127 N. Y. 488; Tobin v. Manhattan Sav. Institution, 6 N. Y. Misc. 110.

Kelly v. Buffalo Sav. Bank, 180 N. Y. 171, revg. 88 N. Y. App. Div. 374; Chase v. Waterbury Sav. Bank, 77 Conn. 295. A bank may properly require an order or power of attorney from the depositor when he does not appear himself with his book, but seeks to act through another. "But the depositor can draw the money without making an order, simply by the presentation of the deposit book, and so can any owner of the book" Ridden v. Thrall, 125 N. Y. 572, 578.

42 Weld v. Eliot Five Cents Sav. Bank, 158 Mass. 339.

the presentor on presentation of his book, applies only to a living depositor.⁴³ Consequently, payment after the depositor's death to another person who claims it as a donee on presentation of the book, is no protection to the bank, especially if having a by-law that in such an event the deposit shall be paid only to the depositor's representatives.⁴⁴

Payment of an order without the book is clearly negligence, for the bank executes only a part of its own rule.⁴⁵ And a regulation that a deposit may be drawn personally, or on the written order of the depositor or his attorney accompanied by the pass-book, excludes all other methods of withdrawal.⁴⁶

(d.) Savings banks seek to protect themselves from loss through failure to identify their depositors. As some banks have many depositors with similar names, the difficulty in identifying them is often very great. A rule to the effect that a bank will not be responsible for losses "where depositors have not given notice that their books have been stolen or lost," has been adopted by many savings banks. Such a rule will protect a bank that pays, after observing due care, to a person who presents a book and personates the depositor.⁴⁷ But it will not protect a bank that pays on the presentation of the book by another with a forged order of the depositor;⁴⁸ or by an administrator erroneously appointed on the supposition that the depositor was dead;⁴⁹ or to a thief in any case without exercising due precaution.⁵⁰

An enlargement of the by-law that "in all cases a payment

43 Mahon v. South Brooklyn Sav. Institution, 175 N. Y. 69. See comment on this case in Kelley v. Buffalo Sav. Bank, 180 N. Y. 171.

44 Ibid.

45 Smith v. Brooklyn Sav. Bank, 101 N. Y. 58.

46 Ibid.

47 Goldrick v. Bristol Co. Sav. Bank, 123 Mass. 320; Wall v. Provident Institution, 3 Allen (Mass.) 96.

48 Kingsley v. Whitman Sav. Bank, 182 Mass. 252; Kimins v. Boston Sav. Bank, 141 Mass. 33. See Levy v. Franklin Sav. Bank, 117 Mass. 448.

49 Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.) 87.

50 Wegner v. Second Ward Sav. Bank, 76 Wis. 242.

upon presentation of a deposit book shall be a discharge to the corporation for the amount so paid," is a protection unless it has been negligent in paying.⁵¹

(e.) The occasions on which a bank has been held negligent and therefore liable, notwithstanding its rules of exemption, will now be considered. A bank is negligent that does not compare the signature of the depositor's order for his deposit with his signature kept by the bank;⁵² or compares it negligently;⁵³ and is still more negligent if it does not keep a signature book for the purpose of making comparisons.⁵⁴ A bank also is negligent that pays a deposit to a stranger when the owner of the deposit book is known by sight to the paying teller;⁵⁵ or pays an unwitnessed order contrary to its by-law;⁵⁶ or on a forged power of attorney;⁵⁷ or pays to another a deposit marked "Special," which the bank is directed by the depositor to pay only to himself;⁵⁸ or pays to another on a power of attorney, purporting to be made by an executor of an estate which is signed by him individually;⁵⁹ or pays a deposit belonging to a minor to her father, who is neither her general nor testamentary guardian;⁶⁰ or refuses to pay a depositor who has identified himself because his name is assumed.⁶¹

51 Levy v. Franklin Sav. Bank, 117 Mass. 448.

52 Fricke v. German Sav. Bank, 4 N. Y. Supp. 627; Tobin v. Manhattan Sav. Institution, 6 N. Y. Misc. 110; Kummel v. Germania Sav. Bank, 127 N. Y. 488; Appleby v. Erie Co. Sav. Bank, 66 Hun (N. Y.) 635; Salting v. German Sav. Bank, 15 Daly (N. Y.) 386; Cornell v. Emigrant Ind. Sav. Bank, 9 N. Y. St. Rep. 72; Kelley v. Buffalo Sav. Bank, 180 N. Y. 171, revg. 88 App. Div. 374; Chase v. Waterbury Sav. Bank, 77 Conn. 295.

53 Hager v. Buffalo Sav. Bank, 10 N. Y. Misc. 455. See Gifford v. Rutland Sav. Bank, 63 Vt. 108.

54 Ladd v. Augusta Sav. Bank, 96 Me. 510, 515.

55 Geitelsohn v. Citizens' Sav. Bank, 20 N. Y. Misc. 84; first trial, 17 N. Y. Misc. 57, revid. *Ibid.*, 574.

56 People's Sav. Bank v. Cupps, 91 Pa. 315.

57 Eaves v. People's Sav. Bank, 27 Conn. 229.

58 Clark v. Saugerties Sav. Bank, 62 Hun (N. Y.) 346.

59 Gearns v. Bowery Sav. Bank, 135 N. Y. 557.

60 Hager v. Buffalo Sav. Bank, 10 N. Y. Misc. 455; Rosen v. State Bank, 32 N. Y. Misc. 231. In this case besides lack of identification, the drawer could only make his mark.

To pay a deposit belonging to an infant child deposited by a grand-

In these cases the burden of proof is on the depositor to show that the bank did not exercise ordinary care and diligence in paying the money.⁶² The inquiry is for the jury.⁶³ But if the bank has been negligent, the depositor's contributory negligence will not avail as a defence.⁶⁴

9. Payment to Lost Book Depositor. Bond of Indemnity.

A depositor who has lost his book is required to give immediate notice of the loss.⁶⁵ The reason for the rule is too plain to require a statement. Disregarding the rule, he cannot recover anything from his bank should it pay his deposit to another who presented the book, unless paying without using proper care.⁶⁶ After giving notice of the loss, he can demand his deposit; though a bank is justified in requiring him to give, for its protection before paying, a bond of indemnity.⁶⁷ Such a requirement must be enforced reasonably;⁶⁸ it cannot be used

father, "R to Clara R," to her father, knowing he was her father, but neither her general nor testamentary guardian, and therefore "not entitled to receive the money," was clearly negligence. *Ficken v. Emigrant's Ind. Sav. Bank*, 33 N. Y. Misc. 92. See *Foley v. Mutual Life Ins. Co.*, 138 N. Y. 333.

61 *Davenport v. Savings Bank*, 36 Hun (N. Y.) 303.

62 *Israel v. Bowery Sav. Bank*, 9 Daly (N. Y.) 507.

63 *Allen v. Williamsburg Sav. Bank*, 69 N. Y. 314; *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242; *Saling v. German Sav. Bank*, 15 Daly (N. Y.) 386.

64 *Chase v. Waterbury Sav. Bank*, 77 Conn. 296.

65 *Sullivan v. Lewiston Sav. Institution*, 56 Me. 507; *Donlan v. Provident Institution*, 127 Mass. 183; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134; *Kelly v. Emigrant Ind. Sav. Bank*, 2 Daly (N. Y.) 227.

66 *Ibid. Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Goldrick v. Bristol Co. Sav. Bank*, 123 Mass. 320; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58; *Fox v. Onondaga Co. Sav. Bank*, 53 Hun (N. Y.) 638; *Winter v. Williamsburgh Sav. Bank*, 68 N. Y. App. Div. 193.

67 *Wall v. Provident Institution*, 3 Allen (Mass.) 96 and 6 Allen 320; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; *Mitchell v. Home Sav. Bank*, 38 Hun (N. Y.) 225.

68 *Wagner v. Howard Sav. Institution*, 52 N. J. Law 225. See *Wallace v. Lowell Institution*, 7 Gray (Mass.) 134; *Palmer v. Providence Institution*, 14 R. I. 68. Thus if a deposit is made by an agent who signs on the books of the bank only the principal's name and receives a book in which the principal is credited with the amount, he is entitled thereto,

as a means to confiscate one's property. A deposit, therefore, cannot be withheld from a depositor who can prove the loss of his book, yet is unable to give the bond.⁶⁹ To withhold payment from such a depositor would be "confiscation." And likewise, when the bank has known for many years of the loss of a depositor's book, it is justified in paying the deposit to his executor without requiring him to give a bond of indemnity.⁷¹ Moreover, a depositor who is physically unable to give notice of loss on the day of its occurrence, may still hold the bank liable should it immediately pay the deposit to a thief.⁷²

Again, if a bank has no by-law requiring a depositor to give notice of the loss of his book, and it is stolen and presented with a forged order, and his deposit is paid to another, nevertheless the bank is still liable to him. "The liability of the bank rests entirely upon contract. No question of negligence, either of the plaintiff or of the bank officials, is involved. The contract was the ordinary one of debtor and creditor."⁷³

10. Payment to Administrators, Executors, Etc.

From these general principles we will pass to others hardly less important relating to particular classes of depositors. And the first relates to the payment of deposits demanded by authority of an administrator or executor.

(a.) An administrator must produce the book in accordance with the by-law requiring its production before he can demand the intestate's deposit.⁷⁴ And if it is lost, ordinarily he must give a bond of indemnity, as the depositor himself would be required to do. In some states, though, this require-

after furnishing proper proof of his ownership, without giving a bond of indemnity. *Wallace v. Lowell Institution*, 7 Gray (Mass.) 134.

69 *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543; *Wagner v. Howard Sav. Institution*, 52 N. J. Law 225.

70 *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543.

71 *Mills v. Albany Ex. Sav. Bank*, 28 N. Y. Misc. 251.

72 *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242.

73 *Ladd v. Androscoggin Co. Sav. Bank*, 96 Me. 520, 524. See *Underhill v. Poughkeepsie Sav. Bank*, 32 Hun (N. Y.) 432.

74 *Wall v. Provident Institution*, 3 Allen (Mass.) 96, and 6 Allen 320.

ment cannot be enforced when proof is complete of the destruction of the book.⁷⁵

(b.) Payment to an administrator or executor is no protection to the bank, though there be no question concerning the legality of his appointment, whenever he had no legal right thereto. In most controversies of this nature the deposit is claimed by someone as a gift, and the liability of the bank to pay the claimant has turned on the question whether the gift had actually been made or not. Whenever the gift has been declared, the bank has been obliged to pay the claimant, and a previous payment to the administrator of the depositor has furnished no defence.⁷⁶

(c.) An administrator may claim and retain a deposit, though entered in the name of "A, trustee for B," if the book has always been retained by the depositor and the beneficiary has had no knowledge of the deposit until after the depositor's death.⁷⁷ A by-law providing that "a pass-book shall be the voucher of the depositor, and evidence of his property in the institution, and the presentation of the pass-book shall be sufficient authority to the bank to make any payment to the bearer," protects a bank in paying to the administrator of a depositor, who presents the book in accordance with the by-law, and

75 Palmer v. Providence Institution, 14 R. I. 68; Hudson v. Roxbury Institution, 176 Mass. 522; Warhus v. Bowery Sav. Bank, 21 N. Y. 543. A rule requiring a pass-book to be presented as a condition of payment and in case the book is lost "the bank will decide to whom payment shall be made," does not justify the bank in refusing to pay a deposit to the executor unless he first furnishes the book or a bond of indemnity. Mills v. Albany Ex. Sav. Bank, 28 N. Y. Misc. 251.

76 Foss v. Lowell Sav. Bank, 111 Mass. 285. When a bank observes its regulations and is not negligent in paying deposits, such payment is a discharge; neither the real depositor nor his representatives have any just or legal claims against the bank. Donlan v. Provident Institution, 127 Mass. 183.

77 Clark v. Clark, 108 Mass. 522; Brabrook v. Boston Sav. Bank, 104 Mass. 228. An administrator cannot recover a deposit made in trust by his intestate for a third person by proving that this was done to secure it from attachment. But if it is needed to pay debts, a different rule applies, and it may be recovered. Wall v. Provident Institution, 6 Allen (Mass.) 320.

who has come into proper possession of the same, even though the deposit had been made in trust.⁷⁸

(d.) Again, an administrator of an insolvent estate has the same right as a creditor to recover a deposit of which a fraudulent disposition has been made.⁷⁹

(e.) In many savings institutions there is a rule that on the death of a depositor the amount standing to his credit shall be paid to his representatives. This rule does not protect a bank in paying to a person who produces a pass-book belonging to a deceased depositor on a collusive judgment against the bank. Notwithstanding the judgment, an administrator, though unable to produce the book, may recover the deposit.⁸⁰

(f.) A bank that pays the deposit of a deceased depositor to a foreign administrator on presentation of the pass-book and a proper record of his authority is protected against a home administrator appointed later without the bank's knowledge; especially if no home creditors complain or suffer by the payment.⁸¹

(g.) In Pennsylvania, by statute, a depositor may appoint a person to whom his deposit may be paid after his death, unless he has made a different disposition by will. The record of the

78 Boone v. Citizens' Sav. Bank, 84 N. Y. 83. In this case the beneficiary had given no notice of his rights, and neither the bank nor the administrator knew of them. The fact that the deposit was in trust did not require the bank to make any inquiry into the nature of the trust before paying the money. Had the beneficiary appeared and made claim thereto, then the bank's duty would have been very different. A by-law provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her representatives." This binds a husband as well as a wife and protects a bank in paying a deposit made by a wife to her legal representative as against her husband, who claims the deposit as representing her own earnings. Kapf v. Dry Dock Sav. Institution, 32 N. Y. Misc. 35. See Howard v. Windham Co. Sav. Bank, 40 Vt. 597.

79 Wall v. Provident Institution, 6 Allen (Mass.) 320.

80 Farmer v. Manhattan Sav. Institution, 60 Hun (N. Y.) 462.

81 Maas v. German Sav. Bank, 73 N. Y. App. Div. 524. See Schulter v. Bowery Sav. Bank, 117 N. Y. 125, 129; Stone v. Scripture, 4 Lans. (N. Y.) 186.

appointment is kept at the bank wherein the deposit was made.⁸²

11. Payment to Joint Depositors.

For several reasons accounts are occasionally kept in two names. In such cases the possession of the pass-book is not evidence of greater dominion by the possessor over the deposit, for the book must be kept by one of them unless it is delivered to a third person.⁸³ If, therefore, each makes and draws deposits, each is presumed to own one-half of the deposit.⁸⁴ The presumption, however, will yield to the fact whenever this is ascertained.⁸⁵ But if a wife's separate property is deposited to the joint account of both, the deposit belongs to her, secure from seizure by his creditors.⁸⁶

(a.) Sometimes deposits are made payable in the alternative to the husband A, for example, or his wife B. Such a deposit, says the New York Court of Appeals, in the absence of other evidence, simply reveals the depositor's purpose that the money "should be drawn out by either of the persons named."⁸⁷ In other words, the entry is no proof of individual ownership. In most of these cases the chief question has arisen after the death of one of them whether the survivor was

82 Appeal of Knorr, 89 Pa. 93; Fidelity Ins. Co. v. Wright, 16 Pa. Week. Notes 177.

83 Chap. XXII. §26. Thompkins v. McGinn, 85 S. W. (Tex. Civ. App.) 452.

84 Gelster v. Syracuse Sav. Bank, 17 N. Y. Week. Dig. 137. See Mulcahey v. Emigrant Ind. Sav. Bank, 89 N. Y. 435; Hairston v. Glenn, 120 N. C. 341; Wetherow v. Lord, 41 N. Y. App. Div. 413.

85 Thompkins v. McGinn, 85 S. W. (Tex. Civ. App.) 452.

86 Syracuse Sav. Bank v. Hess, 23 N. Y. Week. Dig. 280.

87 Matter of Bolin, 136 N. Y. 177; Burke v. Slattery, 10 N. Y. Misc. 754; Brown v. Brown, 23 Barb. (N. Y.) 565. A savings bank deposit in the name of "A for B" belongs to B, and on his death goes to his representatives. Ibid. A savings bank deposit in the names of "A and B either to draw," on the death of A, followed by B's death, may be drawn by the representatives of either A or B, and the one in possession of the pass-book cannot be legally required to surrender it to the other. Smith's Estate, 17 Abb. N. C. (N. Y.) 78; Whitlock v. Bowery Sav. Bank, 17 Abb. N. C. 86.

entitled to the deposit. Of course, the answer has turned largely on the construction of the agreement between themselves and the bank relating to the deposit. Thus, an account has been opened with "A and wife, B, or either," and on the death of A or B the survivor has claimed the deposit as a gift. This contention has generally failed.⁸⁸ If, therefore, the survivor unlawfully draws the money, it may be recovered by the administrator of the deceased.⁸⁹

On one occasion two depositors, A and B, desired their joint deposit to be entered by the bank that "either of them or both could draw the money." A book was given to them, in which the deposit was entered to the credit of A or B. After A's death B informed the bank not to pay the money to A's wife, who had the pass-book. She presented the book with letters of administration and demanded the entire deposit, which was paid to her. The court declared that as the money justly belonged to both A and B the bank could not, after receiving the notification above mentioned, legally pay the administratrix more than one-half of the deposit, and that B was entitled to receive from the bank the other half.⁹⁰

On another occasion an account was opened in a savings bank "to the credit of A, subject to his order, or to the order of B," his daughter. After her father's death, B claimed that he had given her the pass-book with the money to be held in trust for herself, her brother and sisters. The court declared that A had full control of the money during his life and could at any time have drawn it out, or revoked B's authority to draw it. Furthermore, if she had drawn any of it, she would have acted "as his agent; this agency was revoked by his death."⁹¹

88 Schick v. Grote, 42 N. J. Eq. 352; Towle v. Wood, 60 N. H. 434; Brown v. Brown, 23 Barb. (N. Y.) 565; Marshal v. Crutwell, L. R. 20 Eq. (Eng.) 328.

89 Brown v. Brown, 23 Barb. (N. Y.) 565.

90 Mulcahey v. Emigrant Ind. Sav. Bank, 89 N. Y. 435. The bank also sought to shield itself behind the rule providing that all payments to persons producing the pass-book shall be a valid discharge.

91 Murray v. Cannon, 41 Md. 466, 476; Gardner v. Merritt, 32 Md.

(b.) Sometimes a husband acts as the agent of his wife by agreement or by statute, in making or drawing a deposit.⁹² When his agency is properly declared, the bank in dealing with him is governed by the ordinary principles of agency.⁹³ It is not responsible ordinarily for a misapplication of her deposit properly drawn out.⁹⁴ But if he professes to be her agent, and the bank, without proper proof of his authority, permits him to withdraw her money, it is liable to her for the amount.⁹⁵

78. See *Carey v. Dennis*, 13 Md. 1, 18. In *Klenke's Estate*, 210 Pa. 572, two persons made a joint deposit and a written agreement concerning the mode of drawing deposits during their lives, "this authority to continue to the survivor in case of the death of either." The survivor took the whole, the court citing the holding in *Donnelly's Estate*, 7 Pa. Co. Ct. 196, that "where a husband and wife made a deposit in a savings fund in their joint names, they hold by entireties and not by moieties and upon the death of either, the survivor takes the whole." A depositor directed, in writing, the bank's treasurer to add the name of the depositor's niece as owner of a deposit with the interest thereon, "with full authority for each or either of us, or the survivor of us, to draw out the whole or any part." A new pass-book was issued as directed. The niece acquired a good title to the deposit. *Hallenbeck v. Hallenbeck*, 103 N. Y. App. Div. 107. In *Industrial Trust Co. v. Scanlon*, 58 At. (R. I.) 786, a bank deposit was redeposited in the names of "A or B, and payable to either or the survivor of them." B was not present at the time, but was given the book, told that the deposit was his, and that he could draw the whole or any part as he pleased. B thereby became a joint owner and was entitled to the whole on A's death.

92 *Coleman v. First Nat. Bank*, 94 Tex. 605 and cases cited. A savings bank paid to a widow a deposit made by her husband in his own name on satisfactory proof that it was her property. His administrator could not recover it from her. *Nolan v. Manton*, 46 N. J. Law 231.

93 *Wilcox v. Onondaga Co. Sav. Bank*, 40 Hun (N. Y.) 297; *Coleman v. First Nat. Bank*, 94 Tex. 605. Money was deposited in a bank in the name of a wife, but her husband had authority to draw it out, but no authority was thereby conferred on his administrator to do likewise. *Cole v. Bates*, 186 Mass. 584.

94 *Coleman v. First Nat. Bank*, 94 Tex. 605, affg. 17 Tex. Civ. App. 132.

95 *Clark v. Saugerties Sav. Bank*, 62 Hun (N. Y.) 346; *Bates v. First Nat. Bank*, 89 N. Y. 286; *Brown v. Daugherty*, 120 Fed. 526. See *Kerr v. People's Bank*, 158 Pa. 305, and *Honing v. Pacific Bank*, 73 Cal. 464. A deposit in a savings bank by a wife to her credit of the surplus proceeds from the sale of her land, may be recovered by her notwithstanding the unauthorized issue by the bank to her husband of a certificate of deposit for the amount, which had been paid to him. *Burnell v. San Francisco*

Of course, she may relieve the bank by ratifying his conduct.⁹⁶

(c.) Sometimes a husband makes a deposit in his wife's name, which is afterward claimed by him, or his creditors.⁹⁷ If the deposit is his by virtue of statute or other law, or is made in her name to obviate some statutory objection, he may withdraw it,⁹⁸ otherwise she may check it out or retain it like any other property.⁹⁹ Unexplained, the deposit is presumed to be a gift to her.¹

Sav. Union, 136 Cal. 499. A husband who has been doing business for his wife in her name, without objection on her part, creates no estoppel against her in favor of the bank, if it had no knowledge of his agency and did not act on the faith of it. *Brown v. Daugherty*, 120 Fed. 526.

96 *Wilcox v. Onondaga Co. Sav. Bank*, 40 Hun (N. Y.) 297; *Bates v. First Nat. Bank*, 89 N. Y. 286.

97 After the distribution, by will, of money belonging to the husband, but deposited in the wife's name, her husband cannot recover it in equity from the beneficiary. His remedy was against the bank to prevent the payment of it. *Fretz v. Roth*, 68 N. J. Eq. 516.

98 *Sayre v. Weil*, 94 Ala. 466; *McCluskey v. Provident Institution*, 103 Mass. 300. See *Broderick v. Waltham Sav. Bank*, 109 Mass. 149. A husband made deposits getting five different books in his wife's name individually and as trustee in two savings banks. Previous to her death she had executed an assignment of the accounts to him, of which the banks had been notified. By including the deposits in an inventory of her estate, he was not precluded from claiming ownership and transferring them to himself. *Dodge v. Lunt*, 181 Mass. 320. A husband made deposits of his own money in his wife's name, and instructed the bank to honor checks signed by either of them. He received a pass-book with the account standing in her name, and also drew checks on the deposit. After his death she brought a suit to recover the money he had checked out, denying his right to withdraw it, but failed in her contention. *Anniston Nat. Bank v. Howell*, 116 Ala. 375.

99 *People v. State Bank*, 102 N. Y. 740; *German Bank v. Himstedt*, 42 Ark. 62; *Fisk v. Cushman*, 6 Cush. (Mass.) 20; *Sweeney v. Boston Sav. Bank*, 116 Mass. 384; *Crawford's Appeal*, 61 Pa. 52. See *McDermott v. Miners' Sav. Bank*, 100 Pa. 285. In an action by a husband against a bank for money paid to his wife on his account, evidence is admissible that she frequently made deposits on his account, presented his book and drew money therefrom. *Moline State Sav. Bank v. Leggett*, 106 Ill. App. 223. A husband made a bank deposit, taking a certificate jointly in the names of himself and his wife. He told the banker that his object was to enable his wife to draw the money after his death. The banker informed him that he would pay either of them. She kept the certificate, without proof of

12. Payment to Joint Depositors Who Are Mutual Contributors.

There are other questions relating to joint deposits, growing out of the mutual contributions of both to the fund, who are entitled thereto and in what proportions. Their ownership has turned largely on facts, rather than legal principles. Sometimes the husband has been declared the owner,² sometimes the wife,³ in other cases they have been divided. About the only principle to be extracted from them is, if the bank paid to the wrong party, the other has been permitted to recover all, or his or her proportion.⁴

13. Payment to Deposit Kept in Another's Name Without Bank's Knowledge.

On some occasions depositors have put their money in the names of others, the bank supposing the accounts were in their own. Afterward a person, learning that his name has thus been used as a depositor, withdraws the money credited to him. The depositor is without remedy against the bank, for his negligence is his own.⁵

14. Deposit May be Assigned.

A depositor's pass-book is not negotiable, nor can it be endowed with this quality by a bank by-law.⁶ But it may be

his intention to part with the title. This was not a gift, and on his death his estate was entitled to one-half of the deposit. *In re Brown's Estate*, 113 Iowa 351.

1 Klenke's Estate, 210 Pa. 572.

2 Kennebec Sav. Bank v. Fogg, 83 Me. 374. See also *Brown v. Brown*, 23 Barb. (N. Y.) 565; *Matter of Brooks*, 5 Dem. (N. Y.) 326. A husband who transfers his deposit to his wife, to whom a book is issued that is retained by him, who requests her to sign all the checks that are drawn and uses the money, still remains the owner of the deposit. *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257, citing many cases.

3 *Brown v. Brown*, 23 Barb. (N. Y.) 565.

4 *Ibid.*

5 *Arkofsky v. State Sav. Bank*, 91 Minn. 440. See Ch. XXII. §21.

6 *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58; *Newman v. Newman*, 36 N. Y. Misc. 639; *McCaskill v. Conn. Sav. Bank*, 60 Conn. 300; *Witte v. Vincenot*, 43 Cal. 325; *Commonwealth v. Reading Sav. Bank*, 133 Mass. 16.

assigned,⁷ and "a purchaser to whom such a book is delivered without assignment obtains an equitable title to the fund it represents."⁸ The assignee, like the assignee of a non-negotiable note, unless a statute creates a different rule, must sue in the name of his assignor.⁹ As a pass-book may be assigned, in like manner a part of a deposit may be.¹⁰

15. Payment Through the Mail.

Sometimes payments are made by draft through the mail. In some banks there are regulations for making payments in this manner. They often provide that the pass-book must be sent with the order or request for money. As these rules relate to the dealings between the bank and the depositor, they do not prevent him from passing the demand by a general or specific assignment by gift, bequest or operation of law.¹¹

16. Attachment of Deposits.

An individual occasionally deposits money in his name with the addition of "agent," for the purpose of shielding it from his creditors. Such money, of course, can be attached as his, when it belongs to him. The proof of ownership varies in the different cases.¹² For him to withdraw it after legal pro-

⁷ Kingman v. Perkins, 105 Mass. 111; Taft v. Bowker, 132 Mass. 277; Gammond v. Bowery Sav. Bank, 15 Daly (N. Y.) 483; Warhus v. Bowery Sav. Bank, 21 N. Y. 543; National Bank v. Wash. Co. Bank, 5 Hun (N. Y.) 605. A, a savings bank depositor, assigned and delivered his pass-book to B, who duly notified the bank. Afterward the bank was summoned as trustee of A, in a suit against him, was defaulted, and issued a new book to C as trustee, who was A's attorney. C did not thereby become creditor of the bank, for the assignment to B was valid. "The treasurer had no authority to bind the bank by a book which represented neither the A deposit nor any other." Commonwealth v. Scituate Sav. Bank, 137 Mass. 301. See Commonwealth v. Reading Sav. Bank, 133 Mass. 16.

⁸ Endicott, J., Pierce v. Boston Sav. Bank, 129 Mass. 425, 432.

⁹ Howard v. Windham Co. Sav. Bank, 40 Vt. 597.

¹⁰ Jacobs v. Jolley, 29 Ind. App. 25, 34.

¹¹ Gammond v. Bowery Sav. Bank, 15 Daly (N. Y.) 483.

¹² Harry v. Arnold, 84 N. Y. App. Div. 132.

ceedings have been begun to prove his ownership is a highly improper act for which he may be punished.¹³

17. Actions to Recover Deposits.

A savings bank depositor may, after demand, sue the bank for his deposit, though it may have incurred losses and would be unable, if all demanded their deposits, to pay them in full. If continuing to do business, the suit for the full amount may be maintained.¹⁴ But the measure of damages for converting a savings bank book is not the amount of deposits recorded, but only the actual damage sustained by the depositor.¹⁵

18. Action of Interpleader.

Sometimes there are rival claimants and the only safe mode of settling their claims is through judicial action by interpleader. The most general rule is, a bank may interplead parties making adverse claims to money and other property in its possession.¹⁶ Thus, if deposits are made in the name of a person to whom a pass-book is issued, which are claimed, for example, by his administrator and also by another, who asserts himself to be the actual depositor and who brings a suit for their recovery, the bank may make an application to the court to compel the parties to interplead.¹⁷ In like manner, if the administrator of a husband's estate and his wife both claim the same deposit, the bank may file a bill of interpleader to settle the rights of the claimants.¹⁸

13 People v. Kingsland, 3 Keyes (N. Y.) 325; Jackson v. Murray, 25 N. Y. App. Div. 140; Matter of Weld, 34 N. Y. App. Div. 471.

14 Makin v. Savings Institution, 23 Me. 350.

15 Newman v. Munk, 36 N. Y. Misc. 639. The damages for wrongfully refusing to pay a savings bank deposit to a non-trader is the interest of the money. Henderson v. Bank of Hamilton, 25 Ont. Rep. (Can.) 641.

16 Chap. XX. §45. German Ex. Bank v. Commissioners, 6 Abb. N. C. (N. Y.) 394; City Bank v. Skelton, 2 Blatchf. (N. S.) 14; Wehle v. Bowery Sav. Bank, 8 J. & S. (N. Y. Superior) 97; Du Bois v. Union Dime Sav. Institution, 89 Hun (N. Y.) 383.

17 Flanery v. Industrial Sav. Bank, 7 N. Y. Supp. 2; Smith v. Emigrant Ind. Sav. Bank, 2 N. Y. Supp. 617.

18 Wayne Co. Sav. Bank v. Airey, 95 Mich. 520.

CHAPTER XXII.

PAYMENT OF GIFTS.

<ul style="list-style-type: none">1. Subjects of gift.2. Two kinds of gift defined.3. Lex loci that applies to a gift.4. Intention to give must be effective by some act, especially delivery.5. Effect of legal limitation on amount of deposit.6. A gift may be by parol or in writing.7. Gift of savings bank deposit is gift of contract right.8. Delivery may be made to third person as agent of donor, or trustee of donee. Re-delivery.9. What is a good delivery?10. Other acts indicative of a gift.11. Gift may be made in trust. Kinds.<ul style="list-style-type: none">a. Bogus trust.b. Genuine trust.c. Revocable trust.12. When donee is trustee some act besides delivery is required.13. New York rule.14. Some positive acts or declarations to create a gift in trust are required.15. What acts or words are needful?16. Letters and other writings.17. All steps to create a gift in trust need not be taken simultaneously.18. Donor may retain income of a present gift during life.19. A future or contingent gift is invalid.	<ul style="list-style-type: none">20. Donee's knowledge of gift is not essential if other sufficient evidence exists.21. Is a deposit in another's name a gift?22. Validity of a gift of donor's check, note or stock.23. Gift of another's check, note, certificate of deposit or stock.24. Gift of banker's deposit receipt.25. Gift of discount pass-book.26. Gift of deposit payable in the alternative.<ul style="list-style-type: none">a. Distinction between gift of joint deposit and joint stock.b. One party may be simply agent to draw for the other.c. Deposits belonging originally or payable specifically to survivor.d. Possession of pass-book.e. Contemporaneous declarations.f. Joint deposits by husband and wife.27. In establishing a gift of deposit same rule may not apply to bank as to claimant.28. Revocation of gift.29. Gift causa mortis.<ul style="list-style-type: none">a. Requirements.b. Delivery.c. The gift is not favored.d. Evidence required to sustain the gift.
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1. Subjects of Gift.

The gifts that concern banks and bankers are checks,¹ certificates of deposit,² deposit notes,³ savings bank deposits,⁴ bank stocks,⁵ and bonds.⁶ Gifts of other things are outside our field of inquiry.

2. Two Kinds of Gift Defined.

The law recognizes two kinds of gifts: *inter vivos* and *donatio causa mortis*. An *inter vivos* gift contains two elements,—the intention to give and the delivery of the thing given into the control of the donee.⁷ The other kind of gift contains three elements: the thing must be given in apprehension of death; be delivered with the intention of giving; but reverting to the donor if he survives.⁸ Most of the gifts of savings bank deposits are of the *inter vivos* kind. It has been said that the same principles apply to both kinds, but this is not strictly correct.

3. Lex Loci That Applies to a Gift.

The validity of a gift is determined by the law of the place where it was made without regard to the domicile of the donor.⁹

1 See post, §§22, 23.

2 Westerlo v. De Witt, 36 N. Y. 340; Hassell v. Basket, 8 Biss. 303, affd. 107 U. S. 602; Matter of Hall, 16 N. Y. Misc. 174; Hogan v. Sullivan, 114 Iowa 456; Buschian v. Hughart, 28 Ind. 449; Scott v. Lauman, 104 Pa. 593; O'Neil v. Greenwood, 106 Mich. 572.

3 Moore v. Moore, L. R. 18 Eq. (Eng.) 474.

4 The present chapter.

5 Grymes v. Hone, 49 N. Y. 17; Walsh v. Sexton, 55 Barb. (N. Y.) 251; Hatcher v. Buford, 60 Ark. 169; First Nat. Bank v. Holland, 99 Va. 495; Leyson v. Davis, 17 Mont. 220; Garrick v. Taylor, 29 Beav. 79; Fowkes v. Pascoe, L. R. 10 Ch. App. (Eng.) 343.

6 Sterling v. Wilkinson, 83 Va. 791; Matthews v. Hoagland, 48 N. J. Eq. 455, 485, containing many citations.

7 Main's Appeal, 73 Conn. 638; Guinan's Appeal, 70 Conn. 342.

8 Priester v. Priester, Rich. Eq. Cases (S. C.) 26.

9 Emery v. Clough, 63 N. H. 552.

4. Intention to Give Must be Effective by Some Act, Especially Delivery.

To make a gift there must be an intention to give, put into effect by some act directly tending to transfer the dominion of the property to the donee.¹⁰ Therefore a father who is indebted to his son and makes a deposit to the latter's credit intended, so the law presumes, to pay his debt, and not to make a gift.¹¹ It is sometimes said that intention is the larger element, but this, without some act, or series of acts,—delivery, acceptance, declaration, oral or written,—put into effect, will not suffice.¹² Indeed, conjoined with the donative intention, there must be "a complete stripping of the donor of all dominion or control over the thing given."¹³ The law never presumes a gift.¹⁴

¹⁰ *Gerrish v. New Bedford Institution*, 128 Mass. 159; *Hallowell Sav. Institution v. Titcomb*, 96 Me. 62; *Murphy v. Bordwell*, 83 Minn. 54; *Fletcher v. Fletcher*, 55 Vt. 325; *Ross v. Draper*, 55 Vt. 404; *Estate of Malone*, 13 Phila. 313; *In re Schmidt's Estate*, 56 Minn. 256; *Casserly v. Casserly*, 123 Mich. 44.

¹¹ *Watts v. Watts*, 51 S. E. (Va.) 359.

¹² "Mere words of gift alone are not sufficient and are not the basis of any action." *Matter of Wachter*, 16 N. Y. Misc. 137, 139. "The situation, relation and circumstances of the parties, and of the subject of the gift, may be taken into consideration in determining the intent to give and the fact as to delivery." *Merwin, J., Porter v. Gardner*, 60 Hun (N. Y.) 571, 575. "A declaration of an intention to give is not a gift . . . The donor must be divested of, and the donee invested with the right of property." *Appleton, Ch. J., Northrop v. Hale*, 73 Me. 66; *Dole v. Lincoln*, 31 Me. 422, 428; *Taylor v. Henry*, 48 Md. 550; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 288. In *Sprague v. Walton*, 145 Cal. 228, the donor gave his wife an order for his deposit, whereby she was able to transfer it to her own account. "In effect, he put her in possession of the funds and deprived himself of all control. If he intended to do this, and intended it as a gift, the gift was complete. The evidence that he did intend a gift seems to us very strong." In *Murphy v. Bordwell*, 83 Minn. 54, a donor gave a bank deposit to the donee. The credit continued in the donor's name, but a power of attorney was given to the donee, broad enough to cover the deposit, though this was not mentioned. The gift was held to have been effective.

¹³ *Stevenson v. Earl*, 65 N. J. Eq. 721, 723; *Cook v. Lum*, 55 N. J. Law 373, 375; *Schick v. Grote*, 42 N. J. Eq. 352, 355; *Bond v. Bunting*, 78 Pa. 210, affg. 9 Phila. 149; *Murray v. Cannon*, 41 Md. 466, 476; *Nickerson v. Nickerson*, 28 Md. 327, 332. In *First Nat. Bank v. Taylor*, 142 Ala. 456,

One of the most important acts is delivery of the thing given,¹⁵ though this need not be at the time of making the gift.¹⁶ But the law does not require manual delivery;¹⁷ and this cannot be when the property is already in the donee's possession, yet the validity of the gift is not thereby impaired.¹⁸

As there must be a delivery, distinguished from an offer to deliver, so must there be an acceptance.¹⁹ This, however, may be implied, when the gift, otherwise complete, is beneficial to the donee.²⁰ No acts after making the original deposit are evidence of the original intention.²¹

the court said: "To the making of a gift it is essential that there be a delivery, actual or constructive, of the thing, with intent on the part of the donor to divest himself of ownership," the court citing, *Anniston Nat. Bank v. Howell*, 116 Ala. 375; *Broderick v. Waltham Sav. Bank*, 109 Mass. 149; *Davis v. Lenawee Co. Sav. Bank*, 53 Mich. 163.

14 Matter of Bolin, 136 N. Y. 177, 180. "This decision is to be limited to the particular facts upon which it was based." Hatch, J., *Farrelly v. Emigrant Ind. Sav. Bank*, 92 N. Y. App. Div. 529.

15 *Blasdel v. Locke*, 52 N. H. 238, 243; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; *Minchen v. Merrill*, 2 Edw. Ch. (N. Y.) 333, 337; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67; *Martin v. Funk*, 75 N. Y. 134; *Curry v. Powers*, 70 N. Y. 212; *Gray v. Barton*, 55 N. Y. 68; *Young v. Young*, 89 N. Y. 422; *Matter of Clark*, 16 N. Y. Misc. 405; *Matter of Wachter*, 16 N. Y. Misc. 137; *Rosenburg v. Rosenburg*, 40 Hun (N. Y.) 91, 96, and cases cited; *Hallowell Sav. Institution v. Titcomb*, 96 Me. 62; *Fairfield Sav. Bank v. Small*, 90 Me. 546; *Allen v. Polereczky*, 31 Me. 338; *Dole v. Lincoln*, 31 Me. 422; *Donnell v. Wylie*, 85 Me. 143; *Bourne v. Stevenson*, 58 Me. 499; *Robinson v. Ring*, 72 Me. 140; *Augusta Sav. Bank v. Fogg*, 82 Me. 538; *Hill v. Stevenson*, 63 Me. 364; *Hatcher v. Buford*, 60 Ark. 169; *Harris Bkg. Co. v. Miller*, 190 Mo. 640; *In re Soulard's Estate*, 141 Mo. 642; *Dunn v. Bank*, 109 Mo. 97; *McCord v. McCord*, 77 Mo. 166; *Walter v. Ford*, 74 Mo. 195; *Tomlinson v. Ellison*, 104 Mo. 105.

16 *Jacobs v. Jolley*, 29 Ind. App. 25; *Alderson v. Peel*, 64 Law Times (Eng. N. S.) 645.

17 *Pierce v. Boston Sav. Bank*, 129 Mass. 425, 430. For explanation of this requirement, see *Dunn v. Houghton*, 51 At. (N. J. Eq.) 71.

18 *Jacobs v. Jolley*, 29 Ind. App. 25, 36; *Alderson v. Peel*, 64 Law Times (Eng. N. S.) 645; *Cochrane v. Moore*, 63 Law Times (Eng. N. S.) 153.

19 *Beaver v. Beaver*, 117 N. Y., 421, revg. 53 Hun. 258; *Porter v. Gardner*, 60 Hun 571, 575; *Blasdel v. Locke*, 52 N. H. 238, 244; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 287. See §20.

20 *Goelz v. People's Sav. Bank*, 31 Ind. App. 67; *Buschian v. Hughart*, 28 Ind. 449; *O'Neil v. Greenwood*, 106 Mich. 572. See §21.

21 *Robinson v. Appleby*, 69 N. Y. App. Div. 509.

Again, after the complete execution of a gift, the title having passed by delivery of possession, the return of the property for a purpose not inconsistent with the continued ownership of the donee will not invalidate the gift.²² The temporary surrender, therefore, of securities by the donee to the donor, for the purpose of collecting the interest, will not affect the validity of the gift.²³

5. Effect of Legal Limitation on Amount of Deposit.

Sometimes the law imposes a limit on savings bank deposits; in such cases, when the maximum limit has been reached and the depositor opens a new account in the name of another member of his family, but in truth for his own benefit, the evidence that he had thus deposited the full amount in his own name "is admissible as offering a possible explanation of the form adopted other than the intention to make a gift."²⁴

6. Gift May be by Parol or in Writing.

As a gift may be made and established by parol evidence,²⁵ so, if the donee fails in his contention, he is not thereby prevented from establishing by parol a perfect valid trust.²⁶ But in some states a gift, assignment or transfer of a depositor's savings bank book must be in writing and left by copy with the bank.²⁷

²² Scrivens v. North Easton Sav. Bank, 166 Mass. 255; Jacobs v. Jolley, 29 Ind. App. 25, 35, citing Whitford v. Horn, 18 Kan. 455; Matter of Wachter, 16 N. Y. Misc. 137; Ivey v. Owens, 28 Ala. 641; Easly v. Dye, 14 Ala. 158; Danley v. Rector, 10 Ark. 211; Allen v. Knowlton, 47 Vt. 512; McNally v. McAndrew, 98 Wis. 62; Crittenden v. Phoenix Life Ins. Co., 41 Mich. 442.

²³ Martin v. Martin, 170 Ill. 18.

²⁴ Parkman v. Suffolk Sav. Bank, 151 Mass. 218; Fairfield Sav. Bank v. Small, 90 Me. 546, 551.

²⁵ Hill v. Escort, 86 S. W. (Tex. Civ. App.) 367. See §10.

²⁶ Harris Bkg. Co. v. Miller, 190 Mo. 640; In re Soulard's Estate, 141 Mo. 642; Hallowell Sav. Institution v. Titcomb, 96 Me. 62.

²⁷ Law of Wisconsin, 1901, Ch. 390, p. 563; Walsh's Appeal, 122 Pa. 177; Commonwealth v. Crompton, 137 Pa. 138, 147. This rule, wherever existing by by-law, affects no one who has made his deposit prior to its adoption. Ranney v. Bowery Sav. Bank, 39 N. Y. App. Div. 301.

7. Gift of Savings Bank Deposit is Gift of Contract Right.

In treating a gift of a savings bank deposit the courts have usually looked at the thing given in quite the same way as the donor himself, who regards himself as the owner of the deposit, and the bank as his bailee.²⁸ In truth, he is a creditor merely of the bank, having no title to any money in its possession. What the donor gives away is not a chattel, but a contract right, nothing more.²⁹ It is eminently just for the courts to look at a gift, so far as they can consistently with legal principles, as donors look at their transactions. Nevertheless, had the nature of a gift been regarded from a strictly legal point of view, delivery would have played a far less important part in establishing a gift, for the reason that there is nothing to deliver save the evidence of the gift. Regarding this very much as though it were the thing itself, courts have built upon this conception the law of delivery.

8. Delivery May be Made to Third Person as Agent of Donor, or Trustee of Donee. Redelivery.

A delivery may be made to a third person as agent for the donor, or as trustee for the donee. While acting as agent, so long as he retains possession of the property, the gift can be revoked; this, too, would be the effect of the principal's death before the delivery of the property, and the intended gift would consequently fail.³⁰

Again, after a gift has been perfected by delivery, it may be

²⁸ Dunn v. Houghton, 51 At. (N. J. Eq.) 70.

²⁹ Ibid.

³⁰ Barker v. Frye, 75 Me. 29, 33, 34; Hill v. Stevenson, 63 Me. 364; Borneman v. Sidlinger, 15 Me. 429, and 21 Me. 185; Dole v. Lincoln, 31 Me. 422, 429; Eagle & Phenix Mfg. Co. v. Belcher, 89 Ga. 218; Jones v. Deyer, 16 Ala. 221; Dresser v. Dresser, 46 Me. 48; Blasdel v. Locke, 52 N. H. 238, 243; Deneff v. Helms, 42 Or. 161, 165; Matter of Hall, 16 N. Y. Misc. 174; Countant v. Schuyler, 1 Paige (N. Y.) 316; Goelz v. People Sav. Bank, 31 Ind. App. 67; Dickeschied v. Exchange Bank, 28 W. Va. 340; Devol v. Dye, 123 Ind. 321, 326; Michener v. Dale, 23 Pa. 59; Wells v. Tucker, 3 Binn. (Pa.) 366; Drury v. Smith, 1 P. Wms. (Eng.) 404. See Scott v. Lauman, 104 Pa. 593.

re-delivered to the donor as an agent for safe keeping.³¹ Of course, when possession is thus regained by the donor, the difficulty may be enhanced, should the gift be contested, to prove it; but this evidential difficulty does not impair the principle.

9. What is a Good Delivery?

A delivery of money to the treasurer of a savings bank as a deposit for the donee is a sufficient delivery.³² So is a delivery of a bank-book to the donee, even though it has not been assigned;³³ still more, a transfer on the bank-books to the donee, a surrender of the depositor's book and the issue of a new one in the name of the donee.³⁴ While such action in transferring a deposit, taking out a new book in the donee's name may be quite conclusive of a perfected gift, it may be negatived by contemporaneous acts clearly showing that, after all, the donor had in mind a future gift and not a present one.³⁵

To give a savings bank-book by the donor to the donee is generally a sufficient delivery, even without an order or assignment.³⁶ And delivery may sometimes be inferred from

31 Bowron v. De Selden, 105 N. Y. App. Div. 500; Grover v. Grover, 24 Pick. (Mass.) 261.

Contra.—“There is no case which decides that the donor may resume the possession and the donation continue.” Gibbs, Ch. J., Bunn v. Markham, 7 Taunt. (Eng.) 224, 231; Whalen v. Milholland, 89 Md. 199, 201.

32 Hallowell Sav. Institution v. Titcomb, 96 Me. 62; Goelz v. People's Sav. Bank, 31 Ind. App. 67, 72.

33 Hill v. Stevenson, 63 Me. 364; Guinan's Appeal, 70 Conn. 342; Camp's Appeal, 36 Conn. 88; Pierce v. Boston Sav. Bank, 129 Mass. 425. The delivery of a savings bank book and order for the deposit to the donee, will sustain a gift though the depositor dies before presentation of book and order. McGuire v. Murphy, 94 N. Y. Supp. 1005.

34 Hallowell Sav. Institution v. Titcomb, 96 Me. 62. How donor's action may be negatived, see this case.

35 Hallowell Sav. Institution v. Titcomb, 96 Me. 62.

36 Pierce v. Boston Sav. Bank, 129 Mass. 425; Camp's Appeal, 36 Conn. 88; Ridden v. Thrall, 125 N. Y. 572, 577; Hill v. Stevenson, 63 Mo. 364; Main's Appeal, 73 Conn. 638. A son who transferred his deposit to his mother and surrendered his book to the bank, never demanding either the

declarations when direct proof is lacking.³⁷ Still more conclusive is the gift of a book and an order for paying the deposit,³⁸ followed by the donee's notification of the gift to the bank.³⁹ Even an order that is delivered works an effective assignment.⁴⁰

On the other hand, delivery is not necessary, in truth cannot be made, when the donee is already in possession.⁴¹ The same principles also apply to the delivery of the book in a mortis causa gift.⁴²

But delivery by the donor or his agent is a very different thing from mere possession by the self-assumed donee. Changes of possession are constantly occurring during the lifetime of a depositor either through accident or fraud, and still more frequently after his death. Mere possession is only one element of a gift, and not even that if fraudulent or accidental. "There must have existed an intention upon the part of the donor to part absolutely with the property, and such intention

principal or interest during the succeeding fifteen years of her life, made a complete gift to her. *Wickford Sav. Bank v. Corey*, 25 R. I. 217.

Contra.—Walsh's Appeal, 122 Pa. 177.

37 *Harris v. Hopkins*, 43 Mich. 272; *Porter v. Gardner*, 60 Hun (N. Y.) 571, 573; *Grangiac v. Arden*, 10 Johns. (N. Y.) 293, 296; *Young v. Young*, 80 N. Y. 422, 435; *Trow v. Shannon*, 78 N. Y. 446, affg. 8 Daly 239.

38 *Foss v. Lowell Sav. Bank*, 111 Mass. 285; *Kimball v. Leland*, 110 Mass. 325; *Davis v. Ney*, 125 Mass. 590; *Sheedy v. Roach*, 124 Mass. 472, and cases cited.

39 *Foss v. Lowell Sav. Bank*, 111 Mass. 285.

40 *Kingman v. Perkins*, 105 Mass. 111.

41 *Wing v. Merchant*, 57 Me. 383; *Carradine v. Carradine*, 58 Miss. 286, and cases cited; *Southerland v. Southerland*, 5 Bush (Ky.) 591; *Waring v. Edmonds*, 11 Md. 424; *Stevens v. Stevens*, 2 Hun (N. Y.) 470; *Ridden v. Thrall*, 125 N. Y. 572; *Providence Institution v. Taft*, 14 R. I. 502; *Tenbrook v. Brown*, 17 Ind. 410; *Taber v. Willets*, 44 Hun (N. Y.) 346; *Porter v. Gardner*, 60 Hun (N. Y.) 571, 574; *Shower v. Pilck*, 4 Ex. (Eng.) 477. See *Whiting v. Barrett*, 7 Lans. (N. Y.) 106; *Winter v. Winter*, 9 W. R. 747; *Roberts v. Roberts*, 15 W. R. 117.

Contra.—*Cutting v. Gilman*, 41 N. H. 147; *Miller v. Jeffress*, 4 Gratt. (Va.) 472; *Kenney v. Public Adm.*, 2 Brad. (N. Y.) 319.

42 *Tillinghast v. Wheaton*, 8 R. I. 536; *Curtis v. Portland Sav. Bank*, 77 Me. 151; see *Alsop v. Southold Sav. Bank*, 21 N. Y. Supp. 300.

must have been consummated by an actual delivery to the donee."⁴³

10. Other Acts Indicative of a Gift.

Delivery, it should be kept in mind, is only proof of a gift; proof of having yielded control over the thing given. Therefore this may be shown quite as conclusively in other ways. Besides, some things may be given, like a contract right, that cannot be delivered. Accordingly, other acts, as well as declarations and writings showing an intention to give and a parting with the ownership and dominion of the thing are quite as effective.⁴⁴ These acts, though of varied nature, for the most part have been harmoniously interpreted. In many of the failures of donors to create a gift their intention was clearly enough shown, but through lack of time or other circumstance, they did not put it into effect.⁴⁵ In other cases they failed by retaining their property during life, for one of the fundamentals of a gift is the present parting with ownership and possession of the thing given.⁴⁶ A gift that is not to become effective until the donor's death can be given only by will, which must be prepared and executed with many formalities.⁴⁷ As parol and other evidence may thus be used to establish a gift, so it may be employed to identify the beneficiary.⁴⁸

The courts admit all appropriate evidence to establish a gift;⁴⁹ on the other hand, the fraudulent eager-eyed claimant

43 *Dinley v. McCullagh*, 92 Hun (N. Y.) 454, 456.

44 See *Dunn v. Houghton*, 51 At. (N. J. Eq.) 71. A before his death, in the presence of others, gave everything he had to B, who was to care for him while he lived, pay his debts, and send the remainder to A's sister. He made and delivered a certificate of deposit to B, who obtained the money thereon the same day. This was a valid gift to him, and not an attempted testamentary disposition. *Deneff v. Helms*, 42 Or. 161.

45 §4.

46 §4.

47 *Towle v. Wood*, 60 N. H. 434. See §19.

48 *Bartlett v. Remington*, 59 N. H. 364, and cases cited.

49 *Gardner v. Merritt*, 32 Md. 78; *Hill v. Escort*, 86 S. W. (Tex. Civ. App.) 367; *Merigan v. McGonigle*, 205 Pa. 321; *Conn. River Sav. Bank v. Albee*, 64 Vt. 571; *Mabie v. Bailey*, 95 N. Y. 206; *Sayre v. Weil*, 94 Ala. 466.

is not slow to perceive his opportunity and courts are ever watchful to guard the rights of true owners against his designs.⁵⁰ Declarations and other attending circumstances contemporaneous with the donor's act are admitted, but later acts and declarations are generally excluded, especially of trustees. For, as they might wish to change their mind after having made their gift, having possession of the property, it would be easy, did a different rule exist, to defeat their gift. But later acts and statements confirmatory of a gift may be admitted.

11. Gift May be Made in Trust. Kinds.

Gifts in trust are often made of savings bank deposits, the donor serving as the trustee, who may thus act without impropriety and retain the pass-book;⁵¹ or the donor may designate

50 *Savings Bank v. McCarthy*, 89 Md. 194. These acts and declarations must be contemporaneous with the transaction; later ones can have no effect either to confirm or to revoke. It is quite evident that if this wide latitude were given to them, a gift would become a vague, shadowy transaction. *Hyde v. Kitchen*, 69 Hun (N. Y.) 280; *Sprague v. Walton*, 145 Cal. 228; *Scheps v. Bowery Sav. Bank*, 97 N. Y. App. Div. 94; *Kelly v. Home Sav. Bank*, 103 N. Y. App. Div. 141, 152. See §28.

51 *McCarthy v. Provident Institution*, 159 Mass. 527; *Kimball v. Leeland*, 110 Mass. 325; *Milholland v. Whalen*, 89 Md. 212; *Hogan v. Sullivan*, 114 Iowa 456, 461; *Hill v. Stevenson*, 63 Me. 364; *Main's Appeal*, 73 Conn. 638; *Goelz v. People's Sav. Bank*, 31 Ind. App. 67; *Howard v. Windham Co. Sav. Bank*, 40 Vt. 597; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 289; *Barker v. Frye*, 75 Me. 29; *Wing v. Merchant*, 57 Me. 383; *Hallowell Sav. Institution v. Titcomb*, 96 Me. 62; *Bath Sav. Institution v. Hathorn*, 88 Me. 122; *Norway Sav. Bank v. Merriam*, 88 Me. 146; *Urann v. Coates*, 109 Mass. 581; *Gerrish v. New Bedford Institution*, 128 Mass. 159; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208; *Gardner v. Merritt*, 34 Md. 78; *Blasdel v. Locke*, 52 N. H. 238; *Ray v. Simmons*, 11 R. I. 266; *Martin v. Funk*, 75 N. Y. 134; *Weaver v. Emigrant Sav. Bank*, 17 Abb. N. C. (N. Y.) 82; *Millspaugh v. Putnam*, 16 Abb. Pr. (N. Y.) 380; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631; *Langworthy v. Crissey*, 10 N. Y. Misc. 450, 452; *Minor v. Rogers*, 40 Conn. 512; *Kerrigan v. Rautigan*, 43 Conn. 17; *Buckingham's Appeal*, 60 Conn. 143. In 1874 R. S. had entered in her savings bank account: "F. B. S., son of J. and S., to be drawn by F. B. S. after death of R. S." At a later period another entry was made: "This account is in trust for F. B. S." signed by R. S. She kept the pass-book, drew the dividends and after awhile became insane. F. B. S. had no claim thereon against her or her guardian during her lifetime. *Smith v. Speer*, 34 N. J. Eq. 336. See reporter's valuable note.

another person as trustee. When this is done and the property is delivered to him, the presumption is that he is to keep and use the property in that capacity and not merely as the agent of the donor.⁵² The beneficiary must be in existence; consequently, money deposited by one in his own name as trustee for a person who is dead at the time of opening the account passes on the death of the trustee to his administrator.⁵³

(a.) Gifts in trust may be divided into three classes. A bogus trust in which the object of the creator is to increase the amount of his deposit, escape taxation, or acquire some other personal advantage. As such a trust is not valid, the beneficiary acquires nothing, whatever may have been the wrong perpetrated on him by the creator.

(b.) A genuine trust, often for the benefit of minors or others who cannot act legally or intelligently for themselves; and in other cases to avoid the more costly method of testamentary disposition.

(c.) A revocable trust, in which the creator's object is in truth to control his property during his lifetime, and at his death, when it is no longer needed, to part with it and thus avoid the expense and delay attending the disposition of it by will. This kind of a trust, which effectuates the real intention of the creator, has been recently established in New York. Under what conditions does such a trust exist? They have been thus stated by the Court of Appeals: "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary.

52 Devol v. Dye, 123 Ind. 321; Smith v. Youngblood, 68 Ark. 255. "The donee takes the gift, not from the administrator, but against him, and no act or assent on the part of the administrator is necessary to perfect the title of the donee." Smith, J., Emery v. Clough, 63 N. H. 552, 554; Michener v. Dale, 23 Pa. 59.

53 Nicklas v. Parker, 61 At. (N. J.) 267.

In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."⁵⁴

Two well-founded criticisms have been advanced against this innovation—that it invades a great rule that should be preserved, and also that a trust, "revocable at the will of the creator, can hardly be said to be a trust at all."⁵⁵ Nevertheless, the trust fulfils the intention of the creator, and unless there be some good reason why it should not be legally sanctioned, it will serve perfectly the ends of justice. In many of the trusts that have been judicially smitten down the creator attempted to do what he is now permitted to do in New York. He has tried to give away his property with a little string to it for his own benefit, or to make a change should future events unexpectedly darken his wishes. By this ruling many a well-meant creation, which would be destroyed by the old rule, will be preserved.

12. When Donee is Trustee Some Act Besides Delivery is Required.

As a donor may create a gift in trust and retain the book, or create a trust in form, which is not one in fact, some other act besides delivery is necessary, in such cases, as evidence of its true nature. To that end the situation, relationship, declarations and other circumstances may be regarded. In a well-considered case the court remarked: "In most cases where a

54 Matter of Totten, 179 N. Y. 112, 125. See criticism of this case in Nicklas v. Parker, 61 At. (N. J. Eq.) 267, 269. "A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of the right to revoke it." Accordingly, a delivery of railroad shares endorsed in blank, upon trust to pay the income to the settlor for life and at his death to transfer the shares to specified charitable purposes, the settlor "retaining the right to modify said uses or to revoke said trust," is valid and will be upheld in equity. Stone v. Hackett, 12 Gray (Mass.) 227; Thornton on Gifts, §436. See also §§19, 28.

55 14 Yale Law Journal, p. 315.

deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. To infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed.”⁵⁶

We think the true rule may be thus stated: To constitute a trust there must be either an explicit trust declaration, or circumstances showing beyond reasonable doubt that the creation of a trust was intended. “It would introduce a dangerous instability of titles,” says Justice Andrews, “if anything less was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances

56 *Beaver v. Beaver*, 117 N. Y. 421, 431. A deposit entered on a pass-book “payable to A during his life and after his death to B,” does not create a trust, nor a delivery or acceptance by B. *Pope v. Burlington Sav. Bank*, 56 Vt. 284. The intent at the time of the deposit determines the nature and legal effect of the act, and all the surroundings, facts, circumstances and declarations will be taken into consideration on the question of intent, but the deposit in the form of a trust unqualified and unexplained creates a trust at the time, which once legally established cannot be revoked in the absence of a reservation of the power of revocation.” *Robertson v. McCarty*, 54 N. Y. App. Div. 103, 104. Its retention by the trustee may be regarded only as a muniment of the title. And when the trustee the day before her death handed the book to her executor, declaring that she had established a trust for the benefit of the beneficiary therein named, the evidence of the trust was complete. *Scallan v. Brooks*, 54 N. Y. App. Div. 248; *Fairleigh v. Cadman*, 159 N. Y. 169; *Williams v. Brooklyn Sav. Bank*, 51 N. Y. App. Div. 332. When it is clearly shown that the depositor does not make the deposit in trust with the intention of giving it to the beneficiary, but for his own benefit, he still remains the owner notwithstanding the form of the deposit. *Cunningham v. Davenport*, 147 N. Y. 43; *Weber v. Weber*, 9 Daly (N. Y.) 211; *Mabie v. Bailey*, 95 N. Y. 206; *Matter of Mueller*, 15 N. Y. App. Div. 67. A depositor who told the treasurer of a hospital where she was undergoing treatment to make her pass-books payable to a board of missions, and did so, and the new books were sent to her, created a valid trust. *Board of Domestic Missions v. Mechanics' Sav. Bank*, 24 N. Y. Misc. 595. “A trust of personal property may be created or declared by parol.” *Bath Sav. Institution v. Hathorn*, 88 Me. 122, 125; *Milholland v. Whalen*, 89 Md. 212, and cases cited; *Merigan v. McGonigle*, 205 Pa. 321.

capable of another construction, or consistent with a different intention."⁵⁷

By this rule a deposit in the name of "A in trust for B" creates *prima facie* a trust for the latter, but nothing more.⁵⁸ Unexplained, B is entitled to the fund after A's death.⁵⁹ But evidence of the surrounding circumstances tending to throw light on the original transaction may be offered, and is desirable before declaring the trust to have been fully created.⁶⁰ In harmony with this ruling the delivery by a person, who soon afterward dies, of a check on a savings bank and her bank-book will not constitute a gift of the deposit. The possession of the check and book is simply an essential element; the intention is still lacking, which must appear to perfect the gift.⁶¹

13. New York Rule.

In New York, on several occasions, the courts have held that a donor, by depositing money in trust for another, naming

57 Beaver v. Beaver, 117 N. Y. 421, 428.

58 Martin v. Funk, 75 N. Y. 134; Boone v. Citizens' Sav. Bank, 84 N. Y. 83; Willis v. Smyth, 91 N. Y. 297; Mabie v. Bailey, 95 N. Y. 206; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 453, revg. 47 Hun 399; Beaver v. Beaver, 117 N. Y. 421, 423; Matter of Mueller, 15 N. Y. App. Div. 67; Miller v. Seamen's Bank, 33 N. Y. Misc. 708; Bishop v. Seaman's Bank, 33 N. Y. App. Div. 181. In Booth v. Bristol Co. Sav. Bank, 162 Mass. 455, 457, Lathrop, J., said: "A deposit in a savings bank in the name of another is not alone sufficient to prove a gift. Brabrook v. Boston Sav. Bank, 104 Mass. 228; Sherman v. New Bedford Sav. Bank, 138 Mass. 581; Broderick v. Waltham Sav. Bank, 109 Mass. 149. Nor is the fact that the savings bank book designates the depositor as trustee for another conclusive evidence of the existence of the trust. Parkman v. Suffolk Sav. Bank, 151 Mass. 218."

59 Ibid.

60 Ibid.; Decker v. Union Dime Sav. Bank, 15 N. Y. App. Div. 553.

61 Dinley v. McCullagh, 92 Hun (N. Y.) 454, 456; Govin v. De Miranda, 79 Hun 286. "The law will recognize and enforce gifts where they are clearly established if creditors are not thereby prejudiced; but claims of this character are so open to fraud, and so liable to be made, especially against the estates of deceased persons, when there is little foundation for them, that courts will not regard them with favor, and will not sustain them unless fully proved; in other words, there is no presumption in their favor." Carpenter, J., Burton v. Bridgeport Sav. Bank, 52 Conn. 398, 403.

the beneficiary, without notifying him of the donor's action, or without receiving an acceptance of the gift, can establish a trust, which, unexplained, operates to transfer the beneficial interest in the deposit to the beneficiary.⁶² Such action on the donor's part is hardly enough to satisfy the judicial mind generally of the donor's intention, for the reason that it has been shown again and again that he did not intend to make a gift, but to effect some other purpose. Such action is ambiguous and may be interpreted either way, and therefore more conclusive evidence than this is generally required to establish a gift, otherwise it will fail.⁶³ In many of the cases wherein this rule has been applied there was other evidence, quite satisfactory, of the trustee's real intention.⁶⁴ Furthermore, if we understand the Beaver case,⁶⁵ the highest court in New York has returned from the departure above described, and the rule now existing in that state is quite in harmony with the rule prevailing elsewhere.

62 Mabie v. Bailey, 95 N. Y. 206, 209; Martin v. Funk, 75 N. Y. 134; Willis v. Smyth, 91 N. Y. 297; Weaver v. Emigrant Ind. Sav. Bank, 17 Abb. N. C. (N. Y.) 82; Terry v. Ball, 1 Dem. (N. Y.) 452; Boone v. Citizens' Sav. Bank, 84 N. Y. 83; Hyde v. Kitchen, 69 Hun (N. Y.) 280; Smith v. Lee, 2 T. & C. (N. Y.) 591; Barker v. Harbeck, 2 N. Y. Supp. 425.

63 Northrop v. Hale, 73 Me. 66; Robinson v. Ring, 72 Me. 140; Brook v. Boston Sav. Bank, 104 Mass. 228; Clark v. Clark, 108 Mass. 522; Powers v. Provident Institution, 124 Mass. 377; Sherman v. New Bedford Institution, 138 Mass. 581, 582; Kennebec Sav. Bank v. Fogg, 83 Me. 374, 379; Marcy v. Amazeen, 61 N. H. 131; Jewitt v. Shattuck, 124 Mass. 590; Stone v. Bishop, 4 Cliff. (U. S.) 593. Says the court in Haux v. Dry Dock Sav. Institution, 2 N. Y. App. Div. 165, 167: "The rule now established in this State is that whether or not a trust was created depends upon the intention of the donor at the time of the opening of the account and of the deposits made in the bank, and that question is a question of fact to be determined in each particular case from the facts and declarations of the parties and the circumstances surrounding the transaction at the time of the performance of the several acts," citing Cunningham v. Davenport, 147 N. Y. 43.

64 Martin v. Funk, 75 N. Y. 134.

65 117 N. Y. 421.

14. Some Positive Acts or Declarations to Create a Gift in Trust Are Required.

To create a gift in trust, therefore, there must be a delivery of the gift to the trustee or to the beneficiary, or other equivalent acts or words clearly showing the donor's intention and execution of it. Justice Veasey has, we think, well expressed the legal requirement. "To render a voluntary settlement valid and effectual as a trust, it must appear from written or oral declarations, from the nature of the transaction, the relation of the parties, and the purpose of the gift, that the beneficiary relation is completely established."⁶⁶ A clear declaration as effectually passes this equitable title to the beneficiary as delivery passes the legal title to the donee of a gift not in trust.⁶⁷ And if a deposit is made without the beneficiary's knowledge, and the trustee is the donor and keeps the book, the gift must have been intended by the one and accepted by the other in order to be effective.⁶⁸

66 Pope v. Burlington Sav. Bank, 56 Vt. 284, 291; Gardner v. Merritt, 32 Md. 78. To establish by parol evidence a gift in trust, the evidence must be clear, precise, and indubitable. Robinson v. Powell, 210 Pa. 232. A deposited \$100 of her own money in a savings bank in the name of B and took a deposit book containing the following bank entry: "1864, No. 530, B deposited \$100." The treasurer at the same time also entered a similar credit on the bank books to B. This was a perfected gift. Howard v. Windham Co. Sav. Bank, 40 Vt. 597. A deposited money in a savings bank in her name "A or daughter B." Both lived together, and at A's death, B had possession of the bank book, and sought to retain it, claiming the deposit as a gift. Her contention was not sustained. Matter of Bolin, 136 N. Y. 177. "In respect to personal property it is not a matter of any importance, whether it be by a written instrument, or by parol, or partly in one mode and partly in the other. No prescribed form of words is necessary to create an express trust. The intention of the party making it affords the only sure test of its creation." Davis, J., Porter v. Bank of Rutland, 19 Vt. 410, 419.

67 Hallowell Sav. Institution v. Titcomb, 96 Me. 62; Bath Sav. Institution v. Hathorn, 88 Me. 122; Norway Sav. Bank v. Merriam, 88 Me. 146; Minor v. Rogers, 40 Conn. 512; Kerrigan v. Rautigan, 43 Conn. 17; Buckingham's Appeal, 60 Conn. 143; Weaver v. Emigrant Ind. Sav. Bank, 17 Abb. N. C. (N. Y.) 82.

68 Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157; Sweeney v. Boston Sav. Bank, 110 Mass. 384. In Withers v. Weaver, 10 Pa. 391, the owner of a certificate of deposit assigned it in trust for his son, reserving the right

Gifts and trusts, real or pretended, have become so varied, especially of savings bank accounts, that, unless there is a clearly expressed transfer or trust agreement showing the intent of the donor or trustee, their real nature is a question of fact to be determined in the usual manner.⁶⁹ "To infer a gift," said the highest court of New York in a recent case, "from the form of the deposit alone would, in a great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the testator."⁷⁰

15. What Acts or Words Are Needful?

"A person need use no particular form of words to create a trust or to make himself a trustee. It is enough, if, having the property he conveys it to another in trust, or, the property being personal, if he unequivocally declare either orally, or in writing, that he holds it in *præsenti* in trust, or as trustee for another."⁷¹ Thus a depositor put money in a bank as trustee for his children; and afterwards, in trying to establish a gift, they were permitted to introduce his statement to each of them, "that he had put this money in the bank for them, that he wanted to draw the interest during his lifetime; and that after he was gone they were to have the money."⁷² In like manner oral evidence may be admitted to prove that a deposit made in the name of another as trustee was not to create a

to use the money during his life. The money, after the transfer, remained as before, subject to the owner's disposition and control and was not a gift.

69 Kelly v. Home Sav. Bank, 103 N. Y. App. Div. 141, 149; Clay v. Layton, 134 Mich. 317.

70 Beaver v. Beaver, 117 N. Y. 421, 431, quoted with approval in Matter of Totten, 179 N. Y. 112.

71 Ray v. Simmons, 11 R. I. 266, the court citing many English cases; Gerrish v. New Bedford Institution, 128 Mass. 159; Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157; Barker v. Frye, 75 Me. 29; Northrop v. Hale, 73 Me. 66. "The evidence must show that the donor intended to divest himself of the possession of his property and it should be inconsistent with any other intention or purpose." Gray, J., Matter of Bolin, 136 N. Y. 177, 180.

72 Mabie v. Bailey, 95 N. Y. 206.

gift, but simply to evade a law or regulation prohibiting a depositor from making the deposit in his own name; or for some other purpose than a gift.⁷³

16. Letters and Other Writings.

How far can a trust be established by a letter or other writing? To establish an express trust by such proof, the writing must identify the property and disclose the terms of the trust.⁷⁴ A son who had given his mother his savings bank deposit, after her death sought to found a trust on the following letter: "If you need any of that money you must send me word and I will try and send you some. I don't intend to use any of it." The court very rightly held that the last clause implied a power and right to use the money as much as they implied a trust. The evidence was inadequate.⁷⁵

17. All Steps to Create a Gift in Trust Need Not be Taken Simultaneously.

Again, to create a trust, not all the steps need be taken at one time. The declaration may follow the deposit; it may at first be conditional, provisional or tentative. If ultimately the conditions are eliminated, and the provisions are settled, so that the declaration becomes unequivocal, it is sufficient.⁷⁶ And when the donor has done all within his power to complete his gift by relinquishing possession and control of the property to a third person as trustee for the donor, the gift will be upheld, although the donor had no knowledge of the transaction.⁷⁷ The receiving of the property by the trustee is a virtual acceptance on behalf of the donee.⁷⁸

⁷³ Weber v. Weber, 9 Daly (N. Y.) 211; Cleveland v. Springfield Institution, 182 Mass. 110; Brabrook v. Boston Sav. Bank, 104 Mass. 228; Parkman v. Suffolk Co. Sav. Bank, 151 Mass. 218; Gerrish v. New Bedford Institution, 128 Mass. 159; Kennebec Sav. Bank v. Fogg, 83 Me. 374, 379; Mabie v. Bailey, 95 N. Y. 206.

⁷⁴ Taft v. Dimond, 16 R. I. 584.

⁷⁵ Wickford Sav. Bank v. Corey, 25 R. I. 217.

⁷⁶ Hallowell Sav. Institution v. Titcomb, 96 Me. 62.

⁷⁷ Goelz v. People's Sav. Bank, 31 Ind. App. 67; Davis v. Ney, 125 Mass. 590; Brabrook v. Boston Sav. Bank, 104 Mass. 228; Martin v. Funk,

18. Donor May Retain Income of a Present Gift During Life.

A gift may be effective, although it is not to be enjoyed by the donee until the donor's death, or other certain event. The words "at my death" have been more than once construed, and do not render the gift conditional, but simply postpone the day of enjoyment.⁷⁹ A donor therefore may make a gift in trust of a savings bank deposit or other thing, retaining the income for his own life. He may even act as trustee himself. This is no attempt to make a testamentary disposition of the deposit, for then the gift of a testator does not go into effect until after his death. In the gift above mentioned the trustee is appointed immediately, to whom the property is immediately delivered.⁸⁰

19. A Future or Contingent Gift is Invalid.

In most states a gift of a bank deposit,⁸¹ check,⁸² certificate

75 N. Y. 134; Devol v. Dye, 123 Ind. 321; Merigan v. McGonigle, 205 Pa. 321; Hogan v. Sullivan, 114 Iowa 456, 461. See §20.

78 Ibid. See Sparks v. Hurley, 208 Pa. 166.

79 Jacobs v. Jolley, 29 Ind. 25, 33, citing Wyble v. McPheters, 52 Ind. 393; Green v. Tulane, 52 N. J. Eq. 169; O'Neil v. Greenwood, 106 Mich. 572; Merriweather v. Morrison, 78 Ky. 572; Hagerman v. Wigent, 108 Mich. 192; Schollmier v. Schoendelen, 78 Iowa 426; Smith v. Youngblood 68 Ark. 255. One who deposits money in the name of another, draws the interest during his life, pays over a portion of the deposit to the beneficiary, who receives a letter of instruction concerning the disposition of the fund, creates a valid trust, and not a gift. Nor is his retention of the book and drawing of the interest on the deposit inconsistent with the intention. Grafing v. Heilman, 1 N. Y. App. Div. 260. See §19, note 83.

80 Smith v. Ossipee Valley Sav. Bank, 64 N. H. 228; Hallowell Sav. Institution v. Titcomb, 96 Me. 62; Gerrish v. New Bedford Institution, 128 Mass. 159. See Scrivens v. North Easton Sav. Bank, 166 Mass. 255; Eastman v. Woronoco Sav. Bank, 136 Mass. 208; Dunn v. Houghton, 51 At. (N. J. Eq.) 71; Hogan v. Sullivan, 114 Iowa 456; Schollmier v. Schoendelen, 78 Iowa 426; Grymes v. Hone, 49 N. Y. 17; Devol v. Dye, 123 Ind. 321; Providence Institution v. Carpenter, 18 R. I. 287. See Williams v. Guile, 117 N. Y. 343; Dougherty v. Moore, 71 Md. 248. A depositor, at the time of making a deposit, consulted the bank's officers concerning the method of making a person the absolute owner after his death. He was advised to take a certificate of deposit in his own name, and endorse it to the person, which he did, and showed her the certificate, but retained it, saying that he wished to retain and draw the interest during his life. These facts established an executed parol trust. Harris Bkg. Co. v. Miller, 190 Mo. 640.

of deposit,⁸³ note,⁸⁴ or stock of a corporation⁸⁵ that is not to become effective until after the donor's death,⁸⁶ or a contingency,⁸⁷ is invalid. Very often persons make deposits in savings banks for their children or friends, retaining control of them during their lifetime. Such a disposition of one's property is in the nature of a will, but, departing radically from the legal requirements of such an instrument, is ineffective.⁸⁸ The

81 Plasterstein v. Hoes, 37 N. Y. App. Div. 421; Nutt v. Morse, 142 Mass. 1; Sherman v. New Bedford Sav. Bank, 138 Mass. 581, and cases cited; Burton v. Bridgeport Sav. Bank, 52 Conn. 398; Bath Sav. Institution v. Fogg, 101 Me. 188; Bailey v. New Bedford Institution, 78 N. E. (Mass.) 648.

82 Appeal of Waynesburg College, 111 Pa. 130.

83 Pierce v. Boston Sav. Bank, 129 Mass. 425, 430; Baskett v. Hassell, 107 U. S. 602. Evidence of the alleged donee of a certificate of deposit to whom it had been endorsed, that the donor showed it to her, but said he wished to keep it to draw the interest, and that it would be hers at his death, was insufficient to establish a valid executed gift. Spencer v. Vance, 57 Mo. 429; School District v. Sheidley, 138 Mo. 672. In Winslow v. McHenry, 93 Minn. 507, a depositor took out a certificate of deposit payable to the order of himself, or wife, on its return properly endorsed. His object was to enable his wife to collect it after his death. As he retained control of the certificate during his life there was no gift. Consequently, although the bank paid the certificate to her, she was obliged to refund the money to the administrator of her husband's estate.

84 Warren v. Durfee, 126 Mass. 338; Parish v. Stone, 14 Pick. (Mass.) 198; Hulse v. Hulse, 17 C. B. (Eng.) 711. See Dean v. Carruth, 108 Mass. 242; Worth v. Case, 42 N. Y. 362; Harris v. Clark, 3 N. Y. 93.

85 In matter of Morgan, 104 N. Y. 74.

86 See §11.

87 Balling v. Manhattan Sav. Bank, 110 Tenn. 288; Sheegog v. Perkins, 4 Bax. (Tenn.) 273, 281.

88 Main's Appeal, 73 Conn. 638; Burton v. Bridgeport Sav. Bank, 52 Conn. 398; Hallowell Sav. Institution v. Titcomb, 96 Me. 62; Robinson v. Ring, 72 Me. 140; Norway Sav. Bank v. Merriam, 88 Me. 146; Brabrook v. Boston Sav. Bank, 104 Mass. 228; Clark v. Clark, 108 Mass. 522; Davis v. Ney, 125 Mass. 590; Gerrish v. New Bedford Institution, 128 Mass. 159; Taylor v. Henry, 48 Md. 550; Bartlett v. Remington, 59 N. H. 364; Towle v. Wood, 60 N. H. 434; Stevenson v. Earl, 65 N. J. Eq. 721; Weber v. Weber, 9 Daly (N. Y.) 211; Gerry v. Page, 9 Bosw. (N. Y.) 290; Meiggs v. Meiggs, 15 Hun (N. Y.) 453; Spencer v. Vance, 57 Mo. 429; School District v. Sheidley, 138 Mo. 672.

Contra.—Witzell v. Chapin, 3 Bradf. (N. Y.) 386. See Gaskell v. Gaskell, 2 Young & J. (Eng.) 502; Moore v. Moore, L. R. 18 Eq. (Eng.) 474.

actors still remain the owners, and can make any use they please of their deposit.⁸⁹

20. Donee's Knowledge of Gift is Not Essential if Other Sufficient Evidence Exists.

Is knowledge of the gift by the donee a needful element? It clearly is not in all cases of a gift in trust. In one of the latest of these Justice Mestrezat has said that "if a trust created by a deposit in a savings bank is otherwise complete and in existence at the death of the trustee, we can see no good reason why it should be defeated because there is no affirmative evidence that the donee had notice of it during the life of the settlor."⁹⁰ This view is sustained by ample authority.⁹¹

While this is true, the requirement must not be disregarded that proper evidence must exist of the gift, even though the donee himself is ignorant of it. As a court having frequent occasion to consider these questions has recently remarked: "The omission of a depositor to give notice to the beneficiary may, under some circumstances, have great significance as evidence tending to show that there was no intention to create a valid trust."⁹²

21. Is a Deposit in Another's Name a Gift?

Is the act of putting a deposit in the bank in the name of another a gift to him? It is unquestionably so, if, after knowing

For the differences between a *donatio causa mortis* and a will, see *Emery v. Clough*, 63 N. H. 552.

89 *Savings Bank v. McCarthy*, 89 Md. 194.

90 *Merigan v. McGonigle*, 205 Pa. 321, 328.

91 *Conn. River Sav. Bank v. Albee*, 64 Vt. 571; *Bath Sav. Institution v. Fogg*, 63 At. (Me.) 731, 734; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 290; *Booth v. Oakland Bank*, 122 Cal. 19; *Matter of Totten*, 89 N. Y. App. Div. 368, revg. 38 Misc. 349, and containing a good review of the New York decisions; *Gerrish v. New Bedford Institution*, 128 Mass. 159; *Clark v. Clark*, 108 Mass. 522; *Brabrook v. Boston Sav. Bank*, 104 Mass. 228. The Mass. cases must be studied in connection with Stat. 1876, Ch. 203, §20.

See *Norway Savings Bank v. Merriam*, 88 Me. 146.

92 *Bath Sav. Institution v. Fogg*, 63 At. (Me.) 731, 734.

of the deposit, the donee takes no dissenting action.⁹³ But if he does not know of the act, so the Supreme Court of Minnesota has declared, "it would, of itself, no more pass title than would the execution of a deed by a person, and the placing of it on record by him, without the knowledge or consent, express or implied, of the person named as grantee."⁹⁴ While this is technically true, the ground is exceedingly narrow. If an original deposit by one for the benefit of another must be known and accepted by the depositor to be his own, logically the rule should apply to all accretions to the deposit. Yet in thousands of cases deposits are made by one for the benefit of another, especially by parents for their children, which are unknown by the beneficiaries. And this is especially true of additions to deposits. Is not the true rule this: A deposit thus made in another's name without any tag of a trust attaching thereto, indicating that the depositor is trying to retain control, or without other evidence showing his dominion or ownership, belongs to the beneficiary or to the person credited with the deposit. Where the deposit is for the depositor's benefit should not his knowledge and acceptance be presumed? This surely is the law in some states.⁹⁵

It is unquestionably true that a deposit is not a gift whenever the bank is informed by the depositor, at the time of opening his account, that he intends to control his deposit.⁹⁶ or

93 Matter of Crawford, 113 N. Y. 560; Smith v. Ossipee Valley Sav. Bank, 64 N. H. 228; Howard v. Windham Co. Sav. Bank, 40 Vt. 597. See Beaver v. Beaver, 117 N. Y. 421.

94 Branch v. Dawson, 36 Minn. 193, 198, the court citing Brabrook v. Boston Sav. Bank, 104 Mass. 228; Sherman v. New Bedford Sav. Bank, 138 Mass. 581; Robinson v. Ring, 72 Me. 140. See Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157; also remarks of Andrews, J., in Beaver v. Beaver, 117 N. Y. 421, 430.

95 Sparks v. Hurley, 208 Pa. 166; Smith v. Bank, 5 Serg. & R. (Pa.) 318, and other cases cited; Howard v. Windham Co. Sav. Bank, 40 Vt. 597, 600. See Chap. XVI. §§3, 4.

96 First Nat. Bank v. Taylor, 37 So. (Ala.) 695; Davis v. Lenawee Co. Sav. Bank, 53 Mich. 163; Greene v. Bank, 7 Idaho 577. See Ch. XXI. §13. In Michigan a husband transferred a deposit to the name of his wife, without saying anything to her about it, but afterward claimed a portion of

the person in whose name the deposit stands, though knowing the fact, asserts no claim thereto within a reasonable period;⁹⁷ or the deposit is unknown to the person in whose name it stands and the depositor's action in checking it out, or otherwise manipulating it, negatives any intention of parting with the deposit.⁹⁸

22. Validity of a Gift of Donor's Check, Note or Stock.

A gift of the donor's check drawn on an adequate fund⁹⁹ and accepted¹ by the drawee or cashed² before the donor's death is valid as either kind of gift. But if not thus drawn, accepted or cashed through the fault of the drawer,³ the courts on many occasions have declared the gift to be ineffective,⁴ because the maker can, if he pleases, revoke the order.⁵ This rule,

the money on checks signed by her. The court held that the gift was not proved. The facts can be variously interpreted. By signing the checks, she knew of the deposit; on the other hand, his withdrawal might be regarded as negativing any intention to make a gift to her. His conduct may be explained in an endeavor to conceal the ownership of the deposit. *Peninsular Sav. Bank v. Wineman*, 123 Mich. 257.

⁹⁷ *Ibid.*

⁹⁸ *Glendale Invest. Assn. v. Harvey Land Co.*, 114 Wis. 408.

⁹⁹ *Bromley v. Brunton*, L. R. 6 Eq. (Eng.) 275.

¹ *Simmons v. Cincinnati Sav. Society*, 31 Ohio St. 457. "The right to give is as clearly incident to the right of property as the right to sell, . . . hence a delivery by way of gift of an instrument evidencing a debt, without written endorsement by the donor as effectually transfers the beneficial interest in the property to the donee as would such delivery by way of assignment for value." *Polley v. Hicks*, 58 Ohio St. 218; *Penfield v. Thayer*, 2 E. D. Smith (N. Y.) 305.

² *Succession of DePouilly*, 22 La. Ann. 97.

³ *Bromley v. Brunton*, L. R. 6 Eq. (Eng.) 275.

⁴ *Tate v. Hilbert*, 4 Brown Ch. (Eng.) 286; *Simmons v. Cincinnati Sav. Society*, 31 Ohio St. 457; *McKenzie v. Downing*, 25 Ga. 669; *Smith v. Smith*, 30 Hun (N. Y.) 632; *Second Nat. Bank v. Williams*, 13 Mich. 282; *Curry v. Powers*, 70 N. Y. 212; *Harris v. Clark*, 3 N. Y. 93; *Zeller v. Jordon*, 105 Cal. 143; *Pullen v. Placer Co. Bank*, 138 Cal. 169; *Thresher v. Dyer*, 69 Conn. 404; *Gerry v. Howe*, 130 Mass. 350; *Appeal of Waynesburg College*, 111 Pa. 130; *In re Beak's Estate*, L. R. 13 Eq. (Eng.) 489; *Hewitt v. Kaye*, L. R. 6 Eq. (Eng.) 198.

⁵ *Pullen v. Placer Co. Bank*, 138 Cal. 169; *Clay v. Layton*, 134 Mich. 317. For opposite opinion delivered in department, see 66 Pac. 740.

however, has been strongly combatted in a recent case, in which the validity of the gift of a check, that did not reach the drawee bank until after the maker's death, was upheld.⁶ But the maker's action would be still less effective should he direct the payee not to present it for payment until after his death.⁷ On the other hand, a bona fide purchaser of a check from the donee has a good title against the creditors of the donor, though he was insolvent at the time of making the gift.⁸

Whatever contrariety of judicial opinion there may be concerning the effectiveness of a gift by the donor of his own check, there is none concerning an order for his entire deposit accompanied with a delivery of his bank-book. The gift is effective, though neither book nor order is presented to the bank until after the donor's death.⁹

A gift may also be made of bank stock.¹⁰ And a delivery of the certificate, unendorsed, by the donor to the donee, with the intention of transferring the title, will be effectual as an equitable assignment, although no legal title passes from lack of endorsement and transfer on the books of the bank.¹¹ Nor is such a gift by a husband to his wife affected by the subsequent mention of the stock in a will and deed of trust, nor by the payment of dividends on the stock to the donor.¹² Fur-

6 Phinney v. State, 78 Pac. (Wash.) 927, containing an elaborate review of cases.

7 Pullen v. Placer Co. Bank, 138 Cal. 169.

8 Fulweiler v. Hughes, 17 Pa. 440. In the absence of any proof of fraud to one's creditors, he may make notes payable to another who may give them to the maker's wife. Lee v. Newell, 107 Pa. 283.

9 Hill v. Escort, 86 S. W. (Tex. Civ. App.) 367; Kimball v. Leland, 110 Mass. 325; Foss v. Lowell Sav. Bank, 111 Mass. 285; Davis v. Ney, 125 Mass. 590; Sheedy v. Roach, 124 Mass. 475; Pierce v. Boston Five Cents Sav. Bank, 129 Mass. 425; Glynn v. Seaman's Bank, 111 N. Y. 682; Ridden v. Thrall, 125 N. Y. 572; Beaver v. Beaver, 117 N. Y. 421; Hannon v. Sheehan, 22 N. Y. Supp. 935; Minor v. Rogers, 40 Conn. 512; Kerrigan v. Rautigan, 43 Conn. 17; Camp's Appeal, 36 Conn. 88; Tillinghast v. Wheaton, 8 R. I. 536; Curtis v. Portland Sav. Bank, 77 Me. 151; Schollmier v. Schoendelen, 78 Iowa 426.

10 See §1.

11 First Nat. Bank v. Holland, 99 Va. 495.

12 Ibid.

thermore, his declarations at the time of making the gift are admissible to prove the fact.¹³ But the gift must be clearly proved.¹⁴

A gift of bank stock may be made in trust, and the presumption is that the trustee, having once become the possessor in a trust capacity, continues to hold it in that manner.¹⁵ And if he becomes a director on the strength of the shares, the beneficiary is not thereby deprived of her right to regain her property.¹⁶ Furthermore, if the bank is a national institution, a state court possesses jurisdiction to act in the controversy.¹⁷

23. Gift of Another's Check, Note, Certificate of Deposit, or Stock.

A donor may make a valid gift of a check drawn by another person,¹⁸ even though it be not properly assigned.¹⁹ And the same rule applies to a note²⁰ or certificate of deposit,²¹ for this is the obligation of another to pay the donor.

¹³ Ibid.

¹⁴ *In re Fisher's Estate*, 102 N. W. (Iowa) 797. A delivery is rendered colorable and incomplete by a manifest mental reservation by a donor embodied in a power of attorney prepared at the same time as the deed of gift and executed immediately by the donee giving the donor control over the property during his life. *Brown v. Crafts*, 98 Me. 40.

¹⁵ *In re Fisher's Estate*, 128 Iowa 18.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ *Rhodes v. Childs*, 64 Pa. 18; *Gourley v. Linsenbigler*, 51 Pa. 345; *Burke v. Bishop*, 27 La. Ann. 465; *McGlade's Appeal*, 99 Pa. 338; *Clement v. Chesseman*, L. R. 27 Ch. Div. (Eng.) 631.

¹⁹ *Clement v. Cheeseman*, L. R. 27 Ch. Div. (Eng.) 631.

²⁰ *Veal v. Veal*, 27 Beav. (Eng.) 203; *Rankin v. Weguelin*, 27 Beav. 309; *Bates v. Kempton*, 7 Gray (Mass.) 382; *Scott v. Lauman*, 104 Pa. 593. The gift failed in the last case for want of delivery.

²¹ *Basket v. Hassell*, 107 U. S. 602; *Brooks v. Brooks*, 12 S. C. 422; *Westerlo v. DeWitt*, 36 N. Y. 340; *Matter of Hall*, 16 N. Y. Misc. 174; *McCabe's Estate*, 6 Pa. C. C. 42; *Young v. Young*, 80 N. Y. 422; *Welsch v. Belleville Sav. Bank*, 94 Ill. 191; *Burge v. Burge*, 76 S. W. (Ky.) 873; *Phillips v. Franciscus*, 52 Mo. 370; *Amis v. Witt*, 33 Beav. (Eng.) 619; *Moore v. Moore*, L. R. 18 Eq. (Eng.) 474; *Hewitt v. Kaye*, L. R. 6 Eq. (Eng.) 198, 200. A certificate of deposit found in the room of the donor and donee is not sufficient proof of its delivery, though the promise to give it was shown. *Buschian v. Hughart*, 28 Ind. 449. In Texas as "choses in action" are not "goods or chattels" within the statute providing that

The highest federal court has established a different rule declaring in a singularly loose opinion that the omission of the donor's endorsement defeats his gift.²² Other courts declare that the equitable interest is transferred by the delivery of the instrument,²³ and the name of the donor, or that of his representative, may be used, if need be, to bring an action for the recovery of the money.²⁴

In many of the cases the principle has been applied to the gift of a negotiable or non-negotiable note, and we perceive no reason why these applications may not be invoked in the case of a certificate of deposit.

24. Gift of Banker's Deposit Receipt.

The endorsement and delivery of a non-transferable banker's deposit receipt to the donee is a valid gift, although no notice of the act is given to the bank by the donor. It operates as an equitable assignment.²⁵

gifts of goods or chattels shall not be valid without actual possession by the donee, a gift of a certificate of deposit may be perfected by an assignment in writing. Cowen v. First Nat. Bank, 94 Tex. 547.

22 Baskett v. Hassall, 107 U. S. 602.

23 Conner v. Root, 11 Colo. 183; Parish v. Stone, 14 Pick. (Mass.) 198; Chase v. Redding, 13 Gray (Mass.) 418, 420; Bates v. Kempton, 7 Gray 382; Sessions v. Moseley, 4 Cush. (Mass.) 87; Bingham v. Stage, 123 Ind. 281; Turpin v. Thompson, 2 Met. (Ky.) 420; Ashbrook v. Ryan, 2 Bush (Ky.) 228; Stephenson v. King, 81 Ky. 425. See McCabe's Estate, 6 Pa. C. C. 42, and Appeal of Walsh, 122 Pa. 177; 3 Pom. Eq. Jur. §1148. Says Justice Earl: "The general rule in England and in this country, and particularly in this State, is that any delivery of property which transfers to the donee, either the legal or equitable title, is sufficient to effectuate a gift; and hence it has been held that the mere delivery of non-negotiable notes, bonds, mortgages or certificates of stock is sufficient to effectuate a gift." Ridden v. Thrall, 125 N. Y. 572, 577, citing Westerlo v. De Witt, 36 N. Y. 340; Champney v. Blanchard, 39 N. Y. 111; Penfield v. Thayer, 2 E. D. Smith (N. Y.) 305; Walsh v. Sexton, 55 Barb. (N. Y.) 251; Johnson v. Spies, 5 Hun (N. Y.) 468; Allerton v. Lang, 10 Bos. (N. Y.) 362; Camp's Appeal, 36 Conn. 88; Pierce v. Boston Sav. Bank, 129 Mass. 425; Tillinghast v. Wheaton, 8 R. I. 536; In re Mead, L. R. 15 Ch. Div. (Eng.) 651; Moore v. Moore, L. R. 18 Eq. (Eng.) 474.

24 Chase v. Redding, 13 Gray (Mass.) 418, 420.

25 Griffen v. Griffen, 68 L. J. Ch. (Eng.) 220.

25. Gift of Discount Pass-Book.

The gift of a discount bank-book is not effective, because this is only evidence of a deposit due from the depositary. A certificate of deposit is paid on presentation to the original payee, or to another properly endorsed; the presentment of a bank-book would signify nothing; as an order is required to withdraw or transfer the deposit. While this distinction is current, it does not in strictness exist. A depositor can demand his deposit *without an order*, a request similar to that made on presenting his certificate would be sufficient.

It is true, as we have seen, that a different rule has been applied to savings bank-books. Justice has been wrought at the sacrifice of logical consistency. In Pennsylvania, however, the rule that applies to discount bank-books applies there, the Supreme Court declaring that "in the case of a book of original entries, a bank-book, an executory contract, and the like, where the possession of the document affords no presumption of ownership, something more is necessary than the manual delivery of the bank-book or paper in order to make a valid gift."²⁷ And this is the English²⁸ and Canadian rule.²⁹

The question may be asked, Why should any distinction be drawn between the two kinds of books by those courts which regard the transfer of a savings bank-book as evidence of delivery of the deposit? It is true that on some occasions courts have regarded a savings bank depositor as having a closer relation to his bank than depositors in other banking institutions.

²⁶ M'Gonnell v. Murray, 3 Ir. Eq. 460; Ashbrook v. Ryan, 2 Bush. (Ky.) 228; Thomas v. Lewis, 89 Va. 1. "Possession of a deposit book in such a bank does not give a dominion or control over the fund, and hence cannot operate, by a delivery, to transfer ownership of the money deposited." McSherry, Ch. J., Whalen v. Milholland, 89 Md. 199, 208, citing Jones v. Weakley, 99 Ala. 441.

²⁷ Appeal of Walsh, 122 Pa. 177.

Contra.—Tyrrell's Estate, 19 Pa. Week. Notes 334.

²⁸ M'Gonnell v. Murray, 3 Ir. Eq. 460; McCabe v. Robertson, 18 C. P. (U. C.) 471; Moore v. Ulster Bank, 11 Ir. C. L. 512.

²⁹ Lee v. Bank, 30 C. P. (U. C.) 255; *Ex parte Geraw*, 10 New Bruns. 512.

But in both kinds, and everywhere the debtor and creditor relation clearly exists, and there is no reason for regarding differently the pass-books they give to their customers. The Pennsylvania court is logical in not regarding the transfer of either kind of book as evidence of a gift, and in applying the same rule to an endorsed note or certificate of deposit. But in doing so its course is opposed to that of perhaps every other state. An act, which, by other courts, is regarded as decisive of a gift, is in Pennsylvania deemed unworthy of consideration. Unquestionably, the law is greatly simplified by this sweeping rule of evidence.

While Pennsylvania puts all bank-books in the same category, it invades another rule of still more extensive application, that a valid gift of non-negotiable securities may be made by a delivery of them to the donee without assignment or endorsement in writing.³⁰ This rule is maintained in full vigor, with the single exception above noted, but the exception itself seems to be as firmly established as the more general rule.

26. Gift of Deposit Payable in the Alternative.

Deposits are occasionally made payable in the alternative, to "A to B, or either"; or to the order of A or B, or other forms; and the survivor has claimed the money as a gift. In many of these cases the deposit is thus entered simply to render its withdrawal easier, as two persons can draw instead of one. Sometimes the survivor has been awarded half the deposit,³¹ but very generally the courts have held that such an entry, standing by itself, furnishes no satisfactory evidence of a gift. Appropriate evidence may be introduced to show the intention

³⁰ Commonwealth v. Crompton, 137 Pa. 138, 147.

³¹ Chap. XXI, §112. Mulcahey v. Emigrant Ind. Sav. Bank, 89 N. Y. 435; Neiman v. Beacon Trust Co., 170 Mass. 452. A husband deposited money in a bank, taking a certificate jointly in the name of himself and wife. His object in doing so was to enable her to draw the money at his death, and the certificate was given her to keep. This did not constitute a gift to her, and on his death one-half passed to his executor. Matter of Brown's Estate, 113 Iowa 351.

of the depositors, and when a donative purpose is clearly proved the court will give due effect to the wish of the donor.³²

(a.) The courts are less inclined to infer a gift of a bank deposit thus entered than a gift of stock standing in joint names, because there are many reasons besides that of making a gift for entering, in various ways, a deposit in a savings bank. Vice Chancellor Pitney has given a cogent reason. "The motive of convenience in drawing money without personal attendance becomes at once prominent and a not uncommon purpose in the placing of moneys in bank in joint account."³³

32 See *Second Nat. Bank v. Wrightson*, 63 Md. 81.

33 *Skillman v. Wiegand*, 54 N. J. Eq. 198, 203; *Taylor v. Coriell*, 66 N. J. Eq. 262; *Second Nat. Bank v. Wrightson*, 63 Md. 81; *Taylor v. Henry*, 48 Md. 550; *Whalen v. Milholland*, 89 Md. 199; *Providence Institution v. Carpenter*, 18 R. I. 287; *Noyes v. Institution for Savings*, 164 Mass. 583; *In matter of Ward*, 51 How. Pr. (N. Y.) 316; *Drew v. Hagerty*, 81 Me. 231; *Dougherty v. Moore*, 71 Md. 248. The rule has been more fully stated in a recent case in the following words: "Where money belonging to one, and known to belong to him, is deposited by him in his own name and in the name of another, but subject to the control of either, and the depositor claims possession, control and dominion over the pass-book or certificate, without the production of which the fund cannot be drawn, he does not part with the ownership of the fund, and the other person becomes merely an agent of the real owner, acquiring no interest in the fund at all, and ceasing upon the death of the owner to have any authority whatever as agent." *Brewer v. Bowersox*, 92 Md. 567. A, a depositor, directed in writing that her account be placed jointly in the name of herself and B, so that either, or the survivor, could draw all or a part of the deposit. A new pass-book was issued to A containing this order, which she placed in the hand of a friend with the instruction to deliver it to B, after A's death. This was held to be a complete declaration of trust in favor of the survivor. *Hoboken Bank v. Schwoon*, 62 N. J. Eq. 503. If one deposits his own money in the joint names of himself and another, this indicates an intent to vest the title in the survivor. *Wetherow v. Lord*, 41 N. Y. App. Div. 413; *Matter of Barefield*, 82 N. Y. App. Div. 463. The presumption may be rebutted by proper proof. *Ibid.* In *Kelly v. Home Sav. Bank*, 103 N. Y. App. Div. 141, the depositor told a bank officer that she would like to have her account so arranged that either she or her daughter could draw it and, if anything should happen to her, her daughter could get the money without further trouble. The officer replied that "he would make out a new book in the name of herself or her daughter, or the survivor of them," which would effect the desired object. This was done and was effective in giving the deposit to the daughter. "Where the deposit is

(b.) Besides, when money is thus deposited, as either has the right to draw during his lifetime, there is in truth no present gift to anyone. "The effect of the creation of such a joint account is simply to make the one party the agent of the other to draw the money."³⁴ Were the entire deposit, or any portion, drawn by one of them and kept with the other's knowledge and consent, that would be indeed evidence of a gift. But in many cases such an entry "is a mere right to draw money,"³⁵ nothing more; and without further proof there is nothing to show the drawer's right of retention.

(c.) But when it can be shown that the deposit originally belonged to the survivor,³⁶ or is specifically payable by proper entry on the pass-book, or by other evidence, "to the survivor,"³⁷ then, indeed, the title passes to him and he may rightly demand and recover it. Thus a deposit received by a bank from A and B, which it promised to pay "to them or their order at sixty days' notice," created an estate which on the death of one went to the other by right of survivorship.³⁸

(d.) The possession of the pass-book has played a great part in some of these cases. If it can be clearly shown that it was delivered to the survivor during the free lifetime of the al-

in joint names and the intent appears to create the joint tenancy, its effect is to vest the title to the whole fund in the survivor; and under such circumstances, whether the book be delivered to the survivor or not, or whether he ever had it in his possession during the lifetime of the relation of a joint tenancy title vested in the survivor *eo instanti* upon the death of the joint owner, and no delivering of anything is necessary to effectuate such result." Hatch, J., *Farrelly v. Emigrant Ind. Sav. Bank*, 92 N. Y. App. Div. 529.

34 *Ibid.*

35 *Flanagan v. Nash*, 185 Pa. 41, 45.

36 *Baker v. Hedrich*, 85 Md. 645.

37 *Farrelly v. Emigrant Ind. Sav. Bank*, 92 N. Y. App. Div. 529; *Metropolitan Sav. Bank v. Murphy*, 82 Md. 314; *Gorman v. Gorman*, 87 Md. 338; *Milholland v. Whalen*, 89 Md. 212; *Whalen v. Milholland*, 89 Md. 199; *Dennin v. Hilton*, 50 At. (N. J. Eq.) 600; *Dunn v. Houghton*, 51 At. (N. J. Eq.) 71; *Hoboken Bank v. Schwoon*, 62 N. J. Eq. 503; *McElroy v. Albany Sav. Bank*, 8 N. Y. App. Div. 46; *Hannon v. Sheehan*, 19 N. Y. Supp. 698; *Griffith's Estate*, 1 Lack. Leg. News (Pa.) 311, 319.

38 *Brewer v. Bowersox*, 92 Md. 567.

leged donor, then it is usually regarded as strong evidence of the gift.³⁹ So would be the record of the deposit if it were for the "joint owners" or for "joint account," and thus designedly made by the request and knowledge of the depositor. But if such an entry were made by the bank to serve its purpose, and its nature was neither known nor understood by the depositor, it would not signify a donative purpose.⁴⁰

The cases cannot be reconciled. While the slight differences in the terms of the deposit in connection with other circumstances may have been the decisive element in some of the de-

³⁹ Whalen v. Milholland, 89 Md. 199, 207, and cases cited. On the other hand an alternative deposit "A or B in account with" a named bank is no gift to the survivor. Denigan v. Hibernia Sav. Society, 127 Cal. 137. There is no presumption in favor of the gift. Ibid. Grey v. Grey, 47 N. Y. 552, revg. 2 Lans. 173; White v. Warren, 120 Cal. 322. "The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time, as she might need it, and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary intention." Denigan case, 127 Cal. 137, 141. An alternative deposit in the names of "A and B, his wife, and payable to the order of either of them," is no gift to the survivor. Denigan v. San Francisco Sav. Union, 127 Cal. 142. The use of such words is inconsistent with a joint interest and takes away any valid claim by the survivor. Ibid. A deposited money in the names of himself and B, payable to either, or the survivor, and retained control of the deposit book until her death. During A's last sickness she sent word to B to come and get the book, and draw the money at any time. Until then he had no knowledge of the deposit. As he did not get the book until after A's death, the gift was not completed, and the money belonged to A's administrator. Woonsocket Institution v. Heffernan, 20 R. I. 308. In De Puy v. Stevens, 37 N. Y. App. Div. 289, the pass-book entry was, "either or survivor to draw," and that on the bank book "A or B." The gift was not established. In Noyes v. Institution for Savings, 164 Mass. 583, a savings bank book was headed, "A and B, payable to either," the depositor keeping the book and B having no knowledge of the deposit until after A's death. The deposit was A's property. See also Bath Sav. Institution v. Fogg, 101 Me. 188. In another case a mother had her savings bank account changed to herself and son, "payable to either or survivor," retaining possession of the book until her death. The evidence was nothing more than an intention on her part to put the deposit, if existing at her death, at her son's disposition. There was no gift. Matter of Seigler, 49 N. Y. Misc. 189, the court reviewing many cases.

⁴⁰ Ibid.

cisions rendered, another element was also present, the judicial tendency in favor of, or opposition to the doctrine of survivorship. In some of the cases the facts that were regarded as satisfactory proof of survivorship, in other cases failed to make the same impression on the deciding body.⁴¹

(e.) At the time of making a deposit, the depositor's contemporaneous declarations and acts of the depositor are admissible, the same as in the cases of gifts in trust, to show the intention of the depositor.⁴²

(f.) A deposit payable to A and B, husband and wife, or either of them, creates an estate in entirety, which belongs absolutely to the survivor. While this rule is somewhat technical, it clearly exists, except as modified by statute.⁴³ And an order by a husband for the transfer of a deposit consisting of community property, authorizing the bank "to allow [her] to draw" any of it "and to have the right of survivorship," clearly indicates his intention that the bank should act as a trustee for her benefit, and that she should take the deposit after his death as survivor.⁴⁴ Nor would her withdrawal of the money before his death defeat his intention.⁴⁵

Again, an order by a husband and wife to a bank to merge

41 See *Dunn v. Houghton*, 51 At. (N. J. Eq.) 71; *Taylor v. Coriell*, 66 N. J. Eq. 262.

42 *Skillman v. Wiegand*, 54 N. J. Eq. 198; *George v. Howard*, 7 Price (Eng.) 265; *Rider v. Kidder*, 10 Ves. (Eng.) 360; *Kilpin v. Kilpin*, 1 Myl. & K. (Eng.) 520; *Garrick v. Taylor*, 29 Beav. (Eng.) 79; *Whitney v. Wheeler*, 116 Mass. 490. In *Gorman v. Gorman*, 87 Md. 338, the donor subsequently gave the deposit in controversy by will. This fact was regarded as negativing her intention to make the alleged gift. But see contrary view of an act subsequent to the gift. *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157, 166, and cases cited. A husband instructed a bank keeping his deposit to put his wife's name opposite his own, saying that it was as much hers as his own money. When making his will he again stated that this deposit belonged to his wife, and that she had as much control over it as himself. Nevertheless, this was not a gift because he "never deprived himself of authority over the fund." *Burns v. Burns*, 132 Mich. 441.

43 *Roman Catholic Orphan Asylum v. Strain*, 2 Bradf. (N. Y.) 34; *Brewer v. Bowersox*, 92 Md. 567; *Parry's Estate*, 188 Pa. 33.

44 *Sprague v. Walton*, 145 Cal. 228; *Booth v. Oakland Bank*, 122 Cal. 19.

45 *Ibid.*

their separate accounts so that either or the survivor could draw them constitutes each a joint owner of the entirety, and the survivor would become the owner of the entire deposit.⁴⁶ But the order is executory until presentation to the bank and perfecting the change; consequently, at any preceding time, the order may be revoked by either party.⁴⁷ Furthermore, if such an order is left with the husband, he is deemed his wife's agent for the purpose of delivering the order to the bank, and if he fails to do so during her lifetime his agency is ended.⁴⁸

27. In Establishing a Gift of Deposit Same Rule May Not Apply to Bank as to Claimant.

In establishing a gift a different rule may apply to the bank that holds the money than to contending claimants for its ownership. Generally the entry on the pass-book is sufficient protection, if properly followed, in paying payments, especially to a bank possessing no other evidence of the depositor's intention. But as between the rival claimants, the entry is simply one "fact to be considered in connection with other circumstances to determine the donor's intention."⁴⁹

28. Revocation of Gift.

A gift in trust can be revoked only by consent of the parties. There may indeed be a withdrawal of the deposit with or without the beneficiary's knowledge and consent; but a donor who has made a gift can no more change his mind than the grantor of a deed. The fact that the donor may defeat his gift in whole or in part by withdrawing the deposit simply because he is in possession has no bearing on his prior act.⁵⁰ Many a person has tried or wished to change his conduct after acting, but his act is none the less past recall.

46 Augsbury v. Sturtliff, 180 N. Y. 139, revg. 90 App. Div. 613.

47 Ibid. 48 Ibid.

49 Gorman v. Gorman, 87 Md. 338, 351.

50 §8. Decker v. Union Dime Sav. Bank, 15 N. Y. App. Div. 553; Willis v. Smyth, 91 N. Y. 297; Mabie v. Bailey, 95 N. Y. 206; Martin v. Funk, 75 N. Y. 134; Pruitt v. Pruitt, 91 Ind. 595; Richards v. Reeves, 149 Ind. 427; Goelz v. People's Sav. Bank, 31 Ind. App. 67; Minor v. Rogers, 40 Conn. 512; Barker v. Frye, 75 Me. 29, 34; Northrop v. Hale, 73 Me. 66,

29. Gift Causa Mortis.

As a causa mortis gift is not perfected until the donor's death, so by his recovery it is revoked. It is said that the subject of the gift must be delivered, as in the case of an inter vivos gift, but the effect of delivery in the two cases is not the same. In the one case, the title passes; in the other it does not pass, or only conditionally, for if it were complete there could be no subsequent revocation and restoration.⁵¹

(a.) Chief Justice Shepley has said that "to constitute a donatio mortis causa, the gift must be made in contemplation of the near approach of death, to take effect absolutely only upon the death of the donor. There must be a delivery of the property; but a delivery to the donee, or to some other person for his use, will be sufficient. The donor must part with all dominion over the property, so that no further act is required of

71; Taylor v. Henry, 48 Md. 550; Kilpin v. Kilpin, 1 M. & K. (Eng.) 520; Adlington v. Cann, 3 Atk. 151. See §10. "A deposit in the form of a trust unqualified and unexplained, creates a trust at the time, which once legally established cannot be revoked, in the absence of a reservation of the power of revocation." Robertson v. McCarty, 54 N. Y. App. Div. 103, 104. A wife's written order addressed to a savings bank to transfer her account to A, her husband, "to be drawn by him during life," and "after his death the remainder to be divided equally among" five persons, that is never delivered to the bank during the depositor's lifetime is revoked by her death. McNamara v. McDonald, 69 Conn. 484. "The delivery of such an order, with the deposit book, to one of the donees, who was to take a beneficial interest for life, followed by due notice to the bank, upon the acceptance of the gift by the other donees, would invest them immediately, and before any actual transfer upon the books of the bank, with the equitable title to the deposit, subject only to such drafts as might be made upon it for the proper support of the party having a life interest." Ibid. In Merigan v. McGonigle, 205 Pa. 321, 326, a gift in trust, Mestrezat, J., said: "The subsequent declarations of the depositor against the interests of the cestui que trust were not competent to invalidate the trust," citing Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157; Conn. River Sav. Bank v. Albee, 64 Vt. 571.

51 Hatcher v. Buford, 60 Ark. 169. A man may give to his nephew his own (nephew's) note. This was done in the Hatcher case. A donor on his deathbed directed his agent to buy bank stock in the name of his sister and transfer it to her, which was done. This was a valid causa mortis. Ibid. There is a valuable note on gifts causa mortis in 99 Am. St. Rep. 890-918.

him, or of his personal representative, to vest the title perfectly in the donee, if it be not reclaimed by the donor during his life."⁵² And a person possessing testamentary capacity is legally competent to make such a gift.⁵³

(b.) The gift must be delivered or it is not valid; there must be some act done to change the possession from the donor to the donee, or some one for him must not only take, but must retain possession until the death of the donor; if it comes again into the possession of the donor the presumption is that the gift is revoked.⁵⁴

(c.) The policy of the law does not favor gifts of this char-

⁵² Dole v. Lincoln, 31 Me. 422, 429, citing many cases; Champney v. Blanchard, 39 N. Y. 111. "The essential difference between a gift inter vivos and a donatio causa mortis is that the former must take effect during the life of the donor absolutely, completely, and irrevocably, while the latter, although a present transfer of title, is incomplete, and subject to be defeated by the revocation of the donor, his survival of the apprehended peril, or of the donee, or the want of sufficient assets to discharge his debts and liabilities." Denef v. Helms, 42 Or. 161, 164; Liebe v. Battmann, 33 Or. 241; Ridden v. Thrall, 125 N. Y. 572; Basket v. Hassell, 107 U. S. 602. For a good description of a causa mortis gift, see Caylor v. Caylor, 22 Ind. App. 666. The principle that the donor's check cannot be the subject of a donatio causa mortis gift does not apply to a check given for a valuable consideration received by the donor. Such a check is not a gift of any kind, but a contract founded on a full consideration. Whitehouse v. Whitehouse, 90 Me. 468, 477. See Morrill v. Peaslee, 146 Mass. 460. And the transaction will be sustained even though there was no delivery of the check to the beneficiary, but was delivered to another for her benefit. *Ibid.* Evidence in the form of repeated statements from the donor that she had given her bank book to the donee will sustain the gift. Callanan v. Clement, 42 N. Y. Supp. 514, affd. 162 N. Y. 618. A donatio causa mortis should be proved by testimony that an actual gift of the property was made by the donor under an apprehension of death. Snyder v. Harris, 61 N. J. Eq. 480; Buecker v. Carr, 60 N. J. Eq. 300.

⁵³ Matter of Hall, 16 N. Y. Misc. 174.

⁵⁴ Matter of Hall, 16 N. Y. Misc. 174, 179; Cutting v. Gilman, 41 N. H. 147; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Emery v. Clough, 63 N. H. 552. One who stated that she was "going to die" and handed another a number of bank books saying, "Bury me out of this and what is left is yours," made no valid gift. Mahon v. Dime Sav. Bank, 92 N. Y. App. Div. 506. A depositor the day before her death took from under her pillow a savings bank pass-book, gave it to her daughter, told her to go with

acter, and their range should not be extended.⁵⁵ They are necessarily open to the objection of uncertainty, and great strictness and clear proof are, therefore, necessary to establish them, and they can be upheld only when the intention of the donor is clear and definite, and such intent is fully carried out by execution,⁵⁶ but the rule is not carried to the extent of holding that the presumption of law is against such gifts.⁵⁷

the attending physician to the bank and draw the money and keep it, as she was the only one who had ever done anything for her. The daughter took the book, but did not demand the money until after her mother's death. It was a valid gift, whether it was or not strictly *causa mortis*. *Cosgriff v. Hudson City Sav. Institution*, 24 N. Y. Misc. 4. By a dated will A gave all his property to B for taking care of him, which A was to have as long as he lived. Two certificates of deposit were included, properly endorsed to B. The bank refused to pay them, but B recovered them, not as a gift, but in return for his service. *Rivenbaugh v. First Nat. Bank*, 103 N. Y. App. Div. 64. In *Royston v. McCulley*, 59 S. W. (Tenn. Ch. App.) 725, the gift was a certificate of deposit, which had been delivered. For an excellent article on the gift of one's check, see 45 Am. Law Reg. 246, 289.

A person shortly before her death handed to B a savings bank book in which money was credited to the deceased and the dependent. She told B to pay A \$400, some debts and funeral expenses, to which she assented. The deposit belonged to the deceased, but could be withdrawn by B on delivery of the book, before or after the death of the deceased. There was a valid gift to B that could be enforced in equity. *Thorne v. Perry*, 2 N. Bruns. Eq. 146. A person a few hours before her death gave her check to her attorney and assigned to him two bank accounts and directed him how to divide the money. He obtained the money during the donor's lifetime and distributed it afterward as she had directed. This was a valid gift. *Beals v. Crowley*, 59 Cal. 665. The delivery and gift of a savings bank book issued to a married woman by her surviving husband when in extremis is a valid *donatio causa mortis*. *Tillinghast v. Wheaton*, 8 R. I. 536.

55 *Bliss v. Fosdick*, 86 Hun (N. Y.) 162; *Ridden v. Thrall*, 125 N. Y. 572, 581; *Buecker v. Carr*, 60 N. J. Eq. 300; *Keepers v. Fidelity Title & Dep. Co.*, 56 N. J. Law 302, 308. A gift from one to another between whom there is a fiduciary relation will be scrutinized with great jealousy, for example, the giving of a check from a principal to an agent. *Reed v. Carroll*, 82 Mo. App. 102.

56 *Harris v. Clark*, 3 N. Y. 93, 121; *Grey v. Grey*, 47 N. Y. 552; *Grymes v. Hone*, 49 N. Y. 17; *People's Sav. Bank v. Look*, 95 Mich. 7.

57 *Lewis v. Merritt*, 113 N. Y. 386. A donee *mortis causa* can maintain an action in the name of an administrator of the donor's estate and

(d.) "When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift."⁵⁸ And especially when an alleged donor has been surrounded during his last illness by the family and relatives of the alleged donee, and the claimant has had opportunities to obtain possession of the subject of the alleged gift, proof of the claim ought to be clear and satisfactory on every point essential to the title.⁵⁹

even without his consent against the bank to recover his gift. *Pierce v. Boston Sav. Bank*, 129 Mass. 425.

58 *De Puy v. Stevens*, 37 N. Y. App. Div. 289, 293, and cases cited; *Whalen v. Milholland*, 89 Md. 199, 211.

59 *Scott v. Reed*, 153 Pa. 14; *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Rhodes v. Childs*, 64 Pa. 18; *Fross & Loomis' Appeal*, 105 Pa. 258.

CHAPTER XXIII.

CERTIFICATION.

1. Who may certify.	7. Certification before and after delivery.
2. What checks, etc., a bank officer can certify.	8. Conditional certification.
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1. Who May Certify.

The president,¹ cashier,² paying teller³ and board of directors⁴ may certify; but the possession of such authority has been withheld from the assistant cashier.⁵ The usual mode is by writing or stamping the word "good" or "certified" on the

¹ Clafin v. Farmers' Bank, 25 N. Y. 293; Wild v. Bank, 3 Mason (U. S.) 505.

² Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604; Martin v. Webb, 110 U. S. 7; Gale v. Chase Nat. Bank, 43 C. C. A. 496, 499; Muth v. St. Louis Trust Co., 94 Mo. App. 94, 107.

³ Farmers' & Mech. Bank v. National Butchers' & Drov. Bank, 16 N. Y. 125, 14 N. Y. 623 and 28 N. Y. 425; Irving Bank v. Wetherald, 36 N. Y. 335; Meads v. Merchants' Bank, 25 N. Y. 143; Clews v. Bank, 114 N. Y. 70.

Contra.—Massey v. Eagle Bank, 9 Met. (Mass.) 306; Muth v. St. Louis Trust Co., 94 Mo. App. 94, 107.

⁴ Massey v. Eagle Bank, 9 Met. 306, 313.

⁵ Pope v. Bank of Albion, 57 N. Y. 126, revg. 59 Barb. 226.

paper.⁶ The certifier's authority may be shown by evidence of a course of dealing between him, the bank and its customers.⁷ When his lessened authority to certify is unknown to the public, no one is thereby affected who is ignorant of it.⁸

A bank that certifies a draft without notice of the drawer's insolvency in the ordinary course of business, and pays it out of funds in its possession belonging to the drawer, is protected in its action from other creditors of the drawer.⁹

2. What Checks, Etc., a Bank Officer Can Certify.

A cashier has authority to certify only those checks that are drawn in the usual manner. It would not, therefore, cover a post-dated check,¹⁰ or one containing an unusual stipulation.¹¹ But the transgression of a cashier or other employee who is authorized to certify the checks of drawers having sufficient funds will not relieve the bank from responsibility to an innocent holder.¹² On one occasion a teller certified a note without looking at the maker's account, "a careless" act, so the court thought, but in no wise relieving the bank from payment of the money.¹³

3. Authority of a Bank Officer to Certify His Own Check.

Formerly, the rule was inflexible that a bank officer had no authority to certify his own check, or to issue a draft to his own order in payment of his individual debt. A person there-

6 Morse v. Mass. Nat. Bank, 1 Holmes (U. S.) 209, 211; Andrews v. German Nat. Bank, 9 Heisk. (Tenn.) 212, 213.

7 See Chap. IX. §26.

8 Farmers' & Mech. Bank v. National Butchers' & Drov. Bank, 16 N. Y. 125; s. c. 14 N. Y. 623 and 28 N. Y. 425.

9 Strauss v. American Ex. Nat. Bank, 72 Ill. App. 314.

10 Pope v. Bank, 57 N. Y. 126, revg. 59 Barb. 226.

11 Dorsey v. Abrams, 85 Pa. 299.

12 Hill v. Nation Trust Co., 108 Pa. 1; Irving Bank v. Wetherald, 36 N. Y. 335; French v. Irwin, 4 Bax. (Tenn.) 401.

13 National Park Bank v. Steele & Johnson Mfg. Co., 58 Hun (N. Y.) 81, citing Kingston Bank v. Eltinge, 40 N. Y. 391; Lawrence v. American Nat. Bank, 54 N. Y. 432, 435; Union Nat. Bank v. Sixth Nat. Bank, 43 N. Y. 452.

fore who received such a check or draft could be compelled to repay.¹⁴ In the well-known Claflin case, Chief Justice Selden declared that a bank officer could not act in the double capacity of drawer and certifier. Such action clearly was inconsistent.¹⁵

Yet the exigencies of business have taken some of the starch out of the rule, and it is now maintained that a cashier or president may be duly authorized to certify his own check, or issue a draft for the bank in payment of his own debt. Such authority may be inferred from his repeated use of it. "The authority," says the court in one of the latest cases, "is to be implied from the acquiescence of the directors in permitting the officer, during a series of years or in numerous business transactions, to pursue a particular course of conduct; and their acquiescence is derived from their actual knowledge, or from what should have been their knowledge, of the conduct or course of business of the officer."¹⁶ It is a dangerous power to confide to an officer; and the clearest authority must be shown to justify its exercise.¹⁷ Indeed, in a well-considered

¹⁴ Gale v. Chase Nat. Bank, 43 C. C. A. (U. S.) 496; Bank v. American Dock & Trust Co., 143 N. Y. 559; Hanover Nat. Bank v. American & Trust Dock Co., 148 N. Y. 612; Corn Ex. Bank v. American Dock & Trust Co., 149 N. Y. 174; Lamson v. Beard, 36 C. C. A. (U. S.) 56; Dorsey v. Abrams, 85 Pa. 299.

¹⁵ Claflin v. Farmers' Bank, 25 N. Y. 293.

¹⁶ Gale v. Chase Nat. Bank, 43 C. C. A. (U. S.) 496, 499; Goshen Nat. Bank v. State, 141 N. Y. 379; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612; Campbell v. National Broadway Bank, 130 Fed. 699. In the Goshen Nat. Bank case, 141 N. Y. 379, 387, Peckham, J., said: "Bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts and in other commercial transactions that they have almost acquired the characteristics of money. So long as they are drawn on behalf of a solvent bank and upon a solvent drawee, and signed by one of the officers usually signing such instruments, they are regarded by the commercial community very much the same as so much cash, and the fact that the draft was drawn by a cashier directly in favor of his own creditor and sent to that creditor by him, would not naturally give rise even to the suspicion that there was anything irregular, fraudulent or wrong in the conduct of the cashier. The presumption would be that he had performed his duty and paid for the draft, and that it therefore, was his property."

¹⁷ Gale v. Chase Nat. Bank, 43 C. C. A. (U. S.) 496. A cashier of E

case a court has declared that as "the transaction is extraordinary . . . before the bank can be rendered liable thereon, the person receiving such draft or check is bound to make inquiry from the officers of the bank in respect to the validity of the paper."¹⁸

Possessing such a dangerous character, it is proper that, if abused in a transaction between a bank and an innocent person who is misled thereby, the bank should suffer. When, therefore, this power is given to an officer, and it is known by other parties who deal with him, and they have no reason for suspecting his abuse of it, his bank must be held responsible to them, should he take advantage of his situation and issue checks or drafts when his account is overdrawn, or enter them for less than the true amounts, or other acts of a similar character.¹⁹

4. The Acceptance or Certificate is Usually in Writing.

The acceptance is generally in writing, and in some states such an acceptance is required by the statute of frauds,²⁰ otherwise this may be done verbally.²¹

bank gave to B bank his personal check on E bank for the amount of his indebtedness and wrongfully certified it for more than the amount of his deposit. B bank charged the amount to E's bank account and credited A. It was held that B bank at the time of accepting the check was put on inquiry concerning A's authority to certify such a check, and could not hold the money. "It is a well settled rule," says the court, "that the general power or authority given to an agent to act for his principal does not embrace a case where it appears from the transaction that the agent is a party on the other side. Under such circumstances, authority to act will not be upheld unless it appears that the agent was clothed with such power, and the language conferring it must be so plainly expressed that no other rational interpretation can be placed upon it." Rankin v. Bush, 93 N. Y. App. Div. 181, 184, citing Bank v. American Dock and Transp. Co., 143 N. Y. 559; Clarke Nat. Bank v. Bank, 52 Barb. (N. Y.) 592; Jacoby v. Payson, 85 Hun (N. Y.) 367; Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5.

18 State v. Miller, 85 Pac. (Or.) 81, 82.

19 Goshen Nat. Bank v. State, 141 N. Y. 379; Campbell v. Upton, 66 N. Y. App. Div. 434.

20 National State Bank v. Linderman, 161 Pa. 199; Maginn v. Dollar Sav. Bank, 131 Pa. 362; Risley v. Phenix Bank, 83 N. Y. 318; Harker v.

5. Purport of Certification.

The certification implies that the signature of the check is genuine; that it is drawn on sufficient funds in the drawer's possession; that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment.²² Says Chief Justice Mitchell: "A check by a depositor on his account, certified by the bank, becomes an obligation of the bank to the payee or holder, and in the absence of fraud or similar exceptional circumstances the amount is as much withdrawn from the depositor's account as if the money had been paid over the counter."²³ But the certification does not warrant the genuineness of the payee, or the amount, or legally serve the same purpose as money.²⁴ As the bank becomes the primary debtor, its obligation to pay con-

Anderson, 21 Wend. (N. Y.) 372; Luff v. Pope, 5 Hill (N. Y.) 413; Chapman v. White, 6 N. Y. 412; Duncan v. Berlin, 60 N. Y. 151.

21 Barnet v. Smith, 30 N. H. 256; Nelson v. First Nat. Bank, 48 Ill. 36, 40; National Bank v. National Bank, 7 W. Va. 544; Morse v. Mass. Nat. Bank, 1 Holmes (U. S.) 209, 214; Neumann v. Shoeder, 71 Tex. 81; Sturges v. Fourth Nat. Bank, 75 Ill. 595; James v. Wilson, 46 Conn. 90; Dungan v. Flynn, 118 Mass. 537, and cases cited. See Espey v. Bank, 18 Wall. (U. S.) 604.

Contra.—Bank v. First Nat. Bank, 30 Mo. App. 271.

22 Central Guarantee Trust Co. v. White, 206 Pa. 611; Smith v. Branch Bank, 7 Ala. 880; Brown v. Leckie, 43 Ill. 497; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151; Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455; Wright v. McCarty, 92 Ill. App. 120; Born v. First Nat. Bank, 123 Ind. 78; Helwege v. Hibernia Nat. Bank, 28 La. Ann. 520; Barnet v. Smith, 30 N. H. 256; Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 77; Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272; Poess v. Twelfth Ward Bank, 43 N. Y. Misc. 45; Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604.

23 Central Guarantee Trust Co. v. White, 206 Pa. 611, 614.

24 Bickford v. First Nat. Bank, 42 Ill. 238; Born v. First Nat. Bank, 123 Ind. 78; Marine Nat. Bank v. National City Bank, 59 N. Y. 67. In a recent case the court declared that "the delivery to the plaintiff of the certified check drawn on the defendant bank amounted in legal effect to the payment . . . of so much money. The bank was merely the custodian of the money for the plaintiff." Hermann Cabinet Works v. German Ex. Bank, 87 N. Y. Supp. 462. "Certified checks when used and accepted as money in payment of debts must, upon the same grounds of public policy, be treated as payments of money and entitled to the same protection." Fi-

tinues until it is released by payment,²⁵ or by the statute of limitations.²⁶ Moreover, the practical effect of certifying is the same, whether the drawer is charged on the books or not.²⁷

(a.) The legal effect of certifying may be regarded from another side. The bank, by charging the depositor and crediting the holder, establishes virtually the same relation as exists between itself and other depositors. It is virtually a debtor to another person and relieved to the same extent from responsibility to the drawer.²⁸

(b.) Suppose a collecting bank receives from a debtor his check on another bank, and has it certified instead of demanding payment, what is the effect of its action? The liability of the drawer to the bank is discharged, but would he still be liable on his original indebtedness? The affirmative view has been maintained for the reason that the collecting bank could not impair the rights of the owner of the original draft by its conduct.²⁹

(c.) The amount certified is not a special or trust fund that can be claimed by the owner through the happening of the certifier's insolvency, unless the money is segregated and kept apart for that purpose. The crediting of such a check to a special account will not suffice.³⁰

6. Certified Checks Entitled to Same Protection as Money in Payment of Debt.

As money, though procured by fraud or felony, cannot be followed into the possession of an innocent payee in satisfac-

delity Trust Co. v. Baker, 60 N. J. Eq. 171, 174, citing Nassau Bank v. Broadway Bank, 54 Barb. (N. Y.) 236; Justh v. National Bank, 56 N. Y. 478.

²⁵ Metropolitan Nat. Bank v. Jones, 137 Ill. 634; Meuer v. Phenix Nat. Bank, 94 N. Y. App. Div. 331, 339. The certification of a check payable to a person under an assumed or fictitious name, but the one whom the drawer intended, is binding on the certifier. Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322.

²⁶ Ibid.

²⁷ Brown v. Leckie, 43 Ill. 497.

²⁸ People v. St. Nicholas Bank, 77 Hun (N. Y.) 159, 169.

²⁹ Levi v. National Bank, 5 Dill. 104.

³⁰ Italian Fruit & Imp. Co. v. Penniman, 61 At. (Md.) 694.

tion of a debt,³¹ a certified check is in this respect treated as money and entitled to the same protection.³²

7. Certification Before and After Delivery.

When a check is certified before delivery at the maker's request, the legal effect is to bind the bank, as well as the drawer, for its payment.³³ But the latter's obligation is not thereby continued beyond the period established by law for presentation for payment; if, therefore, it is held longer, the certifying bank is alone responsible. Moreover, a check certified at the endorser's request before delivery does not thereby release him.³⁴ By certifying after delivery on the holder's presentation the bank assumes the liability and the debtor is released.³⁵

The highest federal court maintains there is no reason for this distinction;³⁶ in a large number of cases the question has

31 Stephens v. Board of Education, 79 N. Y. 183; Justh v. National Bank, 56 N. Y. 478; Hatch v. Fourth Nat. Bank, 147 N. Y. 184; Nassau Bank v. National Bank, 159 N. Y. 456; Fidelity Trust Co. v. Baker, 60 N. J. Eq. 170; Thomson v. Clydesdale Bank, L. R. App. Cases (1893) 282; Taylor v. Blakelock, L. R. 32 Ch. Div. (Eng.) 560; Gale v. Chase Nat. Bank, 43 C. C. A. 496; Holly v. Missionary Society, 180 U. S. 284.

32 Fidelity Trust Co., Nassau Bank and Justh cases above cited.

33 Larsen v. Breene, 12 Colo. 480; Metropolitan Nat. Bank v. Jones, 137 Ill. 634; Continental Nat. Bank v. Cornhauser, 37 Ill. App. 475; Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933; Oyster & Fish Co. v. Bank, 51 Ohio St. 106; Minot v. Russ, 156 Mass. 458. A vendor of goods inquired by telegraph if the buyer's check for the amount would be honored, and on receiving an affirmative reply sold the goods and took his check. It proved to be a forgery. In an action by the bank to recover back the money it failed, for the vendor was thrown off his guard by the bank's telegram. Iron City Nat. Bank v. Peyton, 15 Tex. Civ. App. 184. See also Leach v. Hill, 106 Iowa 171.

34 Born v. First Nat. Bank, 123 Ind. 78; Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933.

35 Minot v. Russ, 156 Mass. 458, 460, and cases cited; Meuer v. Phenix Nat. Bank, 94 App. Div. 331; Strauss v. American Ex. Bank, 72 Ill. App. 314.

36 First Nat. Bank v. Whitman, 94 U. S. 343. This rule has been recently followed by the Supreme Court of New York. Schlesinger v. Kurzrok, 94 N. Y. Supp. 442, based on First Nat. Bank v. Leach, 52 N. Y. 350. But in the latter case no attempt was made to show the distinction, and the check had been certified at the holder's request.

not been raised. But it is based on a solid reason, for the object of the drawer in procuring its certification before delivery is to strengthen his credit while he has no interest in its certification afterward. Indeed, he expects it will be presented for payment, and if the holder, when making presentment, instead of demanding payment, has it certified and retains possession of it, he enters into a new contract with the bank to which the drawer is not a party and can in no way be made responsible.³⁷ Moreover, when a check is certified at the drawer's request his deposit is as liable to attachment as before.³⁸

Suppose a bank at the time of certifying a check at the drawer's request should transfer the amount at the time of thus certifying to the account of the payee, without the knowledge or acquiescence of either party, would this operate as payment? Possibly nothing may be seen in this question, but suppose the payee, while exercising due diligence in presenting the check for payment, should find the doors of the bank permanently closed, is his recourse against the drawer gone? In many states the drawer would still be liable, and if he were a public officer, and the bank had given a bond for the faithful performance of its duty as a public depository, its surety would be liable.³⁹

8. Conditional Certification.

A check that is conditionally certified or accepted by the drawee bank with the holder's consent, fixing some other time and mode of paying than is expressed or implied by the check itself, operates to discharge, if there be any, the drawer and sureties.⁴⁰ But there is no law preventing a bank from certifying that it will pay whenever the drawer's funds are sufficient for that purpose.⁴¹

37 Minot v. Russ, 156 Mass. 458, 460; Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 639.

38 Gibson v. National Park Bank, 98 N. Y. 87.

39 Cullinan v. Union Surety & Guaranty Co., 79 N. Y. App. Div. 409.

40 Warrensburg Co-operative Building Asn. v. Zoll, 83 Mo. 94; Taylor v. Newman, 77 Mo. 265.

41 National Bank v. National Bank, 7 W. Va. 544.

9. When Mistake in Certifying May be Corrected.

The certification of a check⁴² or note⁴³ by mistake may be corrected before the rights of other parties become affected; and the holder is bound to accept and act on the corrected information.⁴⁴ But after the rights of third parties have intervened, there can be no correction. Indeed, in the Riverside Bank case the court went farther and denied the right of the certifying bank to correct its mistake, even though the holder was still in possession of the certified instrument. Regarding an acceptance or certification as analogous to certifying a check to a depositor's account, Judge Wallace said: "To permit a bank which has paid a note or check of a customer to rescind the transaction because it discovers that it was mistaken in the state of the customer's account, would reverse the rule of commercial law, and transfer from the acceptor to the payee the responsibility which the former assumes by the acceptance and the loss, which should be left where it fell." One may question whether this extreme application of the rule ought to be favored. Why should not corrections be permitted before the rights of other parties are affected?

10. Recovery of Raised Amount.

If a check has been raised before certifying, the bank is not liable for the raised amount, and therefore can recover the excess, unless it was negligent in paying.⁴⁵ Still less reason ex-

42 Dillaway v. Northwestern Nat. Bank, 82 Ill. App. 71.

43 Mount Morris Bank v. Twenty-third Ward Bank, 172 N. Y. 244; Irving Bank v. Wetherald, 36 N. Y. 335; National Park Bank v. Steele & Johnson Mfg. Co., 58 Hun (N. Y.) 81; Second Nat. Bank v. Western Nat. Bank, 51 Md. 128. See Chap. XX. §34.

44 Riverside Bank v. First Nat. Bank, 20 C. C. A. 181; National Com. Bank v. Miller, 77 Ala. 168, 176; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460; Farmers' & Mech. Bank v. Butchers' & Drov. Bank, 16 N. Y. 125; Merchants' Bank v. State Bank, 10 Wall. 604, 646. And if the certification be a crime, the drawer of the check having no deposit or an insufficient one, the bank must pay an innocent holder. Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460. See Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322.

45 Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272;

ists for holding the bank for more than the true amount if the raising was done afterward.⁴⁶ Consequently, it can recover unless the holder would be worse off than he would have been had the excess not been paid in the beginning.⁴⁷ But payment to an agent who has paid over the amount can be recovered only from his principal.⁴⁸

A bank that has paid money on a raised check may elect not to inform the receiving bank of the forgery, and proceed against the payee or holder of the check.⁴⁹ Such a course, however, if long continued, tends to preclude the bank from changing its mode of recovery and proceeding afterward against the bank that received the money.⁵⁰

An unreasonable delay to give notice of paying a raised check bars a recovery. And before bringing a suit for this purpose there must be a tender of the raised instrument, unless this would be a useless act.⁵¹

11. Liability on Certified Forged Check or Overcertified Check.

A bank that certifies a forged check must pay it for the reason long ago given by an eminent jurist. "Seeing that some-

which contains a review of some of the numerous cases of that State; Rapp v. National Security Bank, 136 Pa. 426; City Bank v. First Nat. Bank, 45 Tex. 203; First Nat. Bank v. State Bank, 22 Neb. 760; Third Nat. Bank v. Allen, 59 Mo. 310; Parke v. Roser, 67 Ind. 500; Continental Nat. Bank v. Metropolitan Nat. Bank, 107 Ill. App. 455; Birmingham Nat. Bank v. Bradley, 103 Ala. 109.

Contra.—Louisiana Nat. Bank v. Citizens' Bank, 28 Ala. 189.

A drawer drew a check for \$5 and had it "marked" by the ledger-keeper. The drawer raised the amount to \$500, the check was passed through the clearing house and after its return to the drawee bank the forgery was discovered. It recovered the amount from the other bank to which it had paid the money. *Bank of Hamilton v. Imperial Bank*, 27 Ont. Repeal Rep. (Can.) 590, reviewing the English cases.

⁴⁶ *National Bank v. National Mech. Assn.*, 55 N. Y. 211; *Imperial Bank of Canada v. Bank of Hamilton*, L. R. App. Cases (1903) 49; *Scholfield v. Earl of Londesborough*, L. R. App. Cases (1896) 514.

⁴⁷ Cases in note 45.

⁴⁸ *National City Bank v. Westcott*, 118 N. Y. 468; *National Park Bank v. Seaboard Nat. Bank*, 114 N. Y. 28.

⁴⁹ *Continental Nat. Bank v. Metropolitan Nat. Bank*, 107 Ill. 455.

⁵⁰ *Ibid.* ⁵¹ *Ibid.*

body must be a loser by this deceit, it is more reasonable that he that confides in the decision should be a loser than a stranger."⁵² In like manner a bank that certifies a check in violation of a positive law is as clearly liable to the holder as for any other certified check.⁵³

12. Purport of Answer to Inquiry About Certification.

When inquiry is made concerning the genuineness of a certification, the courts have sometimes construed the inquiry very narrowly as meaning that the certification itself is valid. More generally it has been construed as meaning that the signature as well as the certification is valid; that the bank will be responsible for the amount certified, but not for the genuineness of the payee, nor for the amount stated in the check.⁵⁴ Occasionally, the meaning of such an inquiry is resolved into an investigation of fact in which the precise inquiry becomes important; the words of the answer and the situation of the parties.⁵⁵

The courts have sometimes said that the answer to the inquiry also included the genuineness of the amount, but this is not the better opinion for the reason that the bank does not always know the true amount written in the original check,

52 Farmers' & Mech. Bank v. National Butchers' & Drov. Bank, 16 N. Y. 125, and 14 N. Y. 623; Hagen v. Bowery Nat. Bank, 6 Lans. (N. Y.) 490; Hern v. Nichols, 1 Salk. (Eng.) 289.

53 Rev. Stat. §5208. Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240, affg. 113 N. Y. 325, 334; National Bank v. Stewart, 107 U. S. 676. See Chap. IX. §26.

54 Security Bank v. National Bank, 67 N. Y. 458; Clews v. Bank, 89 N. Y. 418 and 114 N. Y. 70; Espy v. Bank, 18 Wall. (U. S.) 604; Parke v. Roser, 67 Ind. 500; Continental Nat. Bank v. Nat. Bank of Commonwealth, 50 N. Y. 575.

55 Clews v. Bank, 114 N. Y. 70. "Certification does not guarantee the genuineness of any portion of the body of the check, and no duty rests upon the certifying bank to make inquiry relative to such genuineness. . . The rule rests upon the plain reason that a certifying bank is bound to know the signature of its depositor and the condition of his account with it; but it is not bound to know the handwriting of the body of the check." Gray, J., Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272, 283.

and the answer evidently should be limited to matters within the ken of the bank's knowledge.⁵⁶

But a practicable distinction may be drawn in this matter. When a check is certified, whether at the drawer's or subsequent holder's request, the bank makes a record of the fact, and in reply to a subsequent inquiry the bank can truly and easily state the amount of the check at the time of the certification. To require a bank to state this amount is not difficult nor unreasonable. Again, when a check is certified at the drawer's request, this amount is absolutely correct; the only danger, therefore, is in certifications at the request of a subsequent holder.

Again, should the proper certifying officer answer that a check was correct in every particular, his bank would not be bound thereby, because his authority to answer is limited to the genuineness of the instrument. He has no authority to bind the bank for the amount specified.⁵⁷

Sometimes an inquiry and answer are made by telegraph or telephone. In such a case an answer that a check is "all right" means that the signature is genuine and the fund adequate for its payment.⁵⁸ This follows the general current of the cases. The reason is still stronger for giving this qualified liability to the answer, for the drawee bank has not seen the check and therefore knows but little about it; in truth, all it really knows is the state of the maker's account.

13. Revocation of Certified Check.

There can be no revocation of a certified check after its delivery; until then a direction to the bank would be effectual.⁵⁹ In like manner, though it is a fraud for an insolvent drawer to

⁵⁶ *Marine Nat. Bank v. City Nat. Bank*, 59 N. Y. 67; *Clews v. Bank of New York*, 89 N. Y. 418; *Parke v. Roser*, 67 Ind. 500; *Espy v. Bank*, 18 Wall. (U. S.) 604.

⁵⁷ *Security Bank v. National Bank*, 67 N. Y. 458, 463.

⁵⁸ *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530; *Bank of Springfield v. First Nat. Bank*, 30 Mo. App. 271.

⁵⁹ See §9.

have his check certified, the certifying bank cannot recall it from an innocent party to whom it has been paid.⁶⁰

14. Certification of a Note or Draft.

The certifying of a note or draft is "an admission that the acceptor [or maker] has money on deposit in the bank with which to pay the paper when presented for payment, and the bank will retain the money on deposit to pay the holder, and will retain the same on deposit subject to the order of the holder."⁶¹ In Illinois the certification of a note does not release the maker.⁶²

15. Certification by Branch Bank.

Banks with branches may sometimes fall into difficulty in certifying. Thus, suppose a branch of such a bank certifies a check, while another branch certifies a similar check. The second certification is not binding, whenever no rights of third parties are affected. The holder of the second check can simply hold the balance belonging to the maker after payment of the other.⁶³

16. Operation of the Statute of Limitations.

The statute of limitations begins to run against the holder of a certified check from the date of the bank's refusal to pay it.⁶⁴ Nor is the institution estopped from pleading the statute by including such a check in a public statement of the bank's indebtedness.⁶⁵

60 *Bank v. Baxter*, 31 Vt. 101.

61 *Barker, J., Flour City Nat. Bank v. Traders' Nat. Bank*, 35 Hun (N. Y.) 241, 244; *National Park Bank v. Steele & Johnson Mfg. Co.*, 58 Hun 81; *Mount Morris Bank v. Twenty-Third Ward Bank*, 172 N. Y. 244; *Irving Bank v. Wetherald*, 36 N. Y. 335.

62 *Wood v. Merchants' Sav. Loan & Trust Co.*, 41 Ill. 267.

63 *Rankin v. Colonial Bank*, 31 N. Y. Misc. 227.

64 *Girard Bank v. Bank*, 39 Pa. 92; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Bank v. Baxter*, 31 Vt. 101. See *Willets v. Phoenix Bank*, 2 Duer (N. Y.) 121; *Wright v. McCarty*, 92 Ill. App. 120.

65 *Blades v. Grant Co. Dep. Bank*, 21 Ky. L. Rep. 1761.

17. Agreement to Accept Checks.

An agreement by a bank, through the medium of the telegraph or other method, to pay a check drawn thereon by a named person for a specified amount, on which the inquirer acts, parting with property and receiving the check in return, must be fulfilled by payment.⁶⁶ And an oral agreement by a bank to accept checks drawn thereon by a specified person must be fulfilled by paying all checks drawn within a reasonable time, whether the drawer has any funds to meet them or not, provided another person having funds has agreed to pay them.⁶⁷ Whether, without such a guaranty, the third party, for whose benefit the contract was made, can sue thereon has been decided both ways.⁶⁸ The affirmative view is gradually extending,⁶⁹ though the older negative view is still maintained by some of the most highly respected jurisdictions.⁷⁰

It may be questioned whether such a loan is not condemned by the national banking law, because it is a guaranty. Perhaps there can be no objection to it on that ground so long as the bank is properly secured, for, whatever be the form, ample security removes it from the category of a guaranty obligation.

66 North Atchison Bank v. Garrettson, 2 C. C. A. 145, affg. 47 Fed. 867. See Nevada Bank v. Luce, 139 Mass. 488.

67 See Chap. XXVII. §2.

68 Leach v. Hill, 106 Iowa, 171. Seventy days is not an unreasonable time for such an agreement to run. *Ibid.*

69 National Bank v. Grand Lodge, 98 U. S. 123; Hendrick v. Lindsay, 93 U. S. 143; Moore v. House, 64 Ill. 162; Hume v. Brower, 25 Ill. App. 130; Bassett v. Hughes, 43 Wis. 319; Larson v. Cook, 85 Wis. 564; West v. Western Union Tel. Co., 39 Kan. 93, and cases cited; State v. Laclede Gas Co., 102 Mo. 472; Lawrence v. Texas, 20 N. Y. 268; Vrooman v. Turner, 69 N. Y. 280; Hind v. Holdship, 2 Watts (Pa.) 104; Paducah Lumber Co. v. Paducah Water Co., 89 Ky. 340; Coppage v. Gregg, 127 Ind. 359; Clodfelter v. Hulett, 72 Ind. 137. See Sparks v. Hurley, 208 Pa. 166, 172, also note 25 *L. R. A.* 264.

70 Exchange Bank v. Rice, 107 Mass. 37; Mellen v. Whipple, 1 Gray (Mass.) 317; Rogers v. Union Stone Co., 130 Mass. 389; Borden v. Boardman, 157 Mass. 410, and cases cited; Jefferson v. Asch, 53 Minn. 446; Ross v. Milne, 12 Leigh (Va.) 204; Linneman v. Moross, 98 Mich. 178. See excellent note, 39 Am. St. Rep. 531-535, in which the affirmative view is shown to be the prevailing one. See also Chap. VII. §§4, 8, and Chap. XVII. §16.

But when it is not secured such a loan or guaranty, resting solely on the drawer's credit, without any endorsement, is a peculiarly hazardous loan and clearly outside of all the ordinary confidential or credit undertakings known among banking institutions. It is true that banks do not often make such loans, and courts may well hesitate to enforce them, especially for the benefit of third persons whom the banks do not know, or have no means of knowing, and to whom they are under no obligations.

Finally, in many of the cases in which the promise of one to another for the benefit of a third person has been enforced, the promisor knew the third person and there was some peculiar reason moving for making the promise. Such a reason surely does not exist in the case of a bank to a promisor to pay his checks to third persons, of whom even he himself has not the slightest knowledge at the inception of the agreement.

CHAPTER XXIV.

PAYMENT OF FORGED PAPER.

1. What is a forgery. 2. Different parties affected. 3. Rule between drawee bank and depositor. 4. Rule covers signatures and body of check. 5. Duty of drawee of check payable to bearer or endorsed in blank. 6. Duty of drawee of check payable to fictitious payee. 7. Drawer must not be negligent. 8. Relief of bank by special direction. 9. Innocent payee's right to keep the money. a. Recovery between innocent drawee and holder. b. Between innocent drawer and holder. 10. Drawee alone must have been at fault. 11. Rule covers bank correspondents. 12. Reason for rule restricting forgery to drawer's signature. 13. In other cases drawee can recover. Raised check. 14. Recovery of money credited to depositor on forged check.	15. Recovery of money paid on forged endorsement. 16. Recovery by true payee of drawee bank. 17. Effect of endorsement by agent. 18. Recovery from agent. 19. Paper from agent "for collection." 20. By prepaying the drawee an innocent holder requires no right against prior holder. 21. Recovery on paper containing forged signature and endorsement. 22. Recovery on forged discounted paper. 23. How long is bank liable to repay on forged check. 24. Notice of forgery. a. When it must be given. b. When it need not be. c. When knowledge of forgery by drawer protects bank in future. 25. Statutory rule. 26. Care holder must take of checks to prevent loss or forgery.
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1. What is a Forgery?

A forgery may consist in altering the body of a check, or simulating the signature of the drawee or of the payee.¹ Should a person bearing the same name as the payee of a check

¹ Dan. on Neg. Inst., §1344.

endorse and transfer it, knowing that he is not the intended payee, he, too, would practice a forgery.²

2. Different Parties Affected.

The law, within the field of our inquiry, flows from three relations: those between the drawee and drawer; the drawee and holder; the drawee and wrongful receiver of the money. The principles defining the rights of the drawee and drawer will be first considered.

3. Rule Between Drawee Bank and Depositor.

A bank is bound by a severe rule in paying the checks of a depositor. It must follow his order with the utmost strictness.³ Therefore payment of a check which has been altered in the least important particular, the date,⁴ name of payee,⁵ amount,⁶ endorser,⁷ signature,⁸ or a mistaken payment to the

2 Graves v. American Ex. Bank, 17 N. Y. 205; Meade v. Young, 4 Term (Eng.) 28; Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85. See §6.

3 In Western Union Tel. Co. v. Bi-Metallic Bank, 17 Colo. App. 229, the court said: "The contract between a bank and a depositor is that it will pay out his money only upon, and in accordance with his express direction. A check drawn in favor of a particular payee or order is payable only to the actual payee or upon his genuine endorsement, it is not payment in pursuance of its authority, and it will be responsible."

4 Crawford v. West Side Bank, 100 N. Y. 50.

5 Citizens' Nat. Bank v. Importers & Traders' Nat. Bank, 119 N. Y. 195; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475; Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, citing many cases. The obtaining a check by fraud does not excuse the bank from liability for paying it on a forged endorsement. Kuhn v. Frank, 7 Ohio Week. Law Bull. 134.

6 National Bank v. Nolting, 94 Va. 263; Hall v. Fuller, 5 B. & C. (Eng.) 750. See First Nat. Bank v. Allen, 100 Ala. 476.

7 Shaffer v. McKee, 19 Ohio St. 526; Dodge v. National Ex. Bank, 20 Ohio St. 234 and 30 Ohio St. 1; Kuhn v. Frank, 7 Ohio Week. Law Bull. 134; Pickle v. Muse, 88 Tenn. 380; Pollard v. Wellford, 99 Tenn. 113; People's Bank v. Franklin Bank, 88 Tenn. 299; Brixen v. Deseret Nat. Bank, 5 Utah 504; West Phila. Bank v. Green, 3 Penny. (Pa.) 456; Jackson Paper Mfg. Co. v. Commercial Bank, 199 Ill. 151; First Nat. Bank v. Pease, 168 Ill. 40; Atlanta Nat. Bank v. Burke, 81 Ga. 597; Lennon v. Brainard, 36 Minn. 330; Vanbibber v. Bank, 14 La. Ann. 481; Levy v. Bank, 24 La. Ann. 220; Henderson Trust Co. v. Ragan, 21 Ky. L. Rep. 601;

wrong person,⁹ is in disregard of the depositor's order and the check cannot be charged to his account.

Or, to change the form of statement, if the bank does so, the drawer can, after discovering the forgery, compel the drawee to withdraw the charge. This rule is well understood and has been often applied.¹⁰

Mechanics' Nat. Bank v. Harter, 63 N. J. Law 578; Buckley v. Second Nat. Bank, 35 N. J. Law 400; Star Fire Ins. Co. v. N. H. Nat. Bank, 60 N. H. 442; First Nat. Bank v. State Bank, 22 Neb. 769; Canal Bank v. Bank, 1 Hill (N. Y.) 287; Coggill v. American Ex. Bank, 1 N. Y. 113; Weisser v. Denison, 10 N. Y. 68; Graves v. American Ex. Bank, 17 N. Y. 205; Morgan v. Bank, 1 Duer (N. Y.) 434, affd. 11 N. Y. 404; Corn Ex. Bank v. Nassau Bank, 91 N. Y. 74; Thomson v. Bank, 82 N. Y. 1; Bank v. Merchants' Nat. Bank, 91 N. Y. 106; Citizens' Nat. Bank v. Importers & Traders' Nat. Bank, 119 N. Y. 195; Turnbull v. Boyer, 40 N. Y. 456; Kearney v. Metropolitan Trust Co., 110 N. Y. App. Div. 236; Western Union Tel. Co. v. Bi-Metallic Bank, 17 Colo. App. 229; Winslow v. Everett Nat. Bank, 171 Mass. 534; Murphy v. Metropolitan Nat. Bank, 191 Mass. 159; Leather Manuf. Bank v. Merchants' Bank, 128 U. S. 26.

8 Leavitt v. Stanton, Hill & Denio (N. Y.) 413; Georgia R. & Bkg. Co. v. Love & Good Will Society, 85 Ga. 293; First Nat. Bank v. First Nat. Bank, 151 Mass. 280; Farmers' & Merch. Bank v. Bank of Rutherford, 115 Tenn. 64; Laborde v. Consolidated Association, 4 Rob. (La.) 190; National Bank v. Grocers' Nat. Bank, 35 How. Pr. (N. Y.) 412; Neal v. Coburn, 92 Me. 139; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207; Stout v. Benoist, 39 Mo. 277.

9 Cases of alleged negligence in paying without proper identification. Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628, 649; Dodge v. National Ex. Bank, 20 Ohio St. 234 and 30 Ohio St. 1; Janin v. London & San Francisco Bank, 92 Cal. 14; First Nat. Bank v. First Nat. Bank, 151 Mass. 280; Salt Springs Bank v. Syracuse Sav. Institution, 62 Barb. (N. Y.) 101; First Nat. Bank v. State Bank, 22 Neb. 769; Canadian Bank v. Bingham, 30 Wash. 484; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151; Western Union Tel. Co. v. Bi-Metallic Bank, 17 Colo. App. 229; United States v. National Ex. Bank, 45 Fed. 163; Moody v. First Nat. Bank, 19 Tex. Civ. App. 278; Pollard v. Wellford, 99 Tenn. 113.

10 Ibid. "Nothing but payment, accord and satisfaction, or a release under seal is an answer to the depositor's demand." Winslow v. Everett Nat. Bank, 171 Mass. 534, 535; Leather Manuf. Bank v. Merchants' Bank, 128 U. S. 26, 34. "The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. It is for him to rely upon his own knowledge and means of information on the subject, and not upon presumptions arising from the opinions of others." Howard v. Miss. Valley Bank, 28 La. Ann. 727, 728. "A payment by a bank of a check to any person, save the payee himself, except it be payable to bearer

Though the act of a forger or any other criminal act cannot be ratified, a depositor may ratify the conduct of a bank in paying forged checks that have been charged to his account. And in many states this is the effect of not examining his pass-book and vouchers within a reasonable period after the balancing of his account.¹¹

Notwithstanding the breadth of this rule, it does not apply to a bank that has agreed with a principal to cash the checks of his agent, but who keeps no deposit and between whom and the bank the ordinary relations of bank and depositor do not exist. Thus a corn dealer arranged with a bank for the payment of checks drawn by his agent in payment of corn. From time to time these checks were to be sent to the principal with drafts for the amount. The agent made checks purporting to be in payment for corn, endorsed them, and obtained the money. The court rightfully held that the bank had no means of distinguishing between those given in payment of real transactions and the others; but his principal had, and he alone was at fault in not detecting the forgeries.¹²

4. Rule Covers Signatures and Body of Check.

Between bank and depositor the rule extends to all alterations or forgeries.¹³ Thus a depositor drew a check and, post-dating

is a payment at its peril. If the signature of endorsement is genuine, it is a payment out of the depositor's funds; if it is forged, it is a payment out of the bank's funds, and the depositor cannot be charged with it." *Rice v. Citizens' Nat. Bank*, 21 Ky. L. Rep. 346; *Shipman v. Bank*, 126 N. Y. 318; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597; *Hatton v. Holmes*, 97 Cal. 208; *First Nat. Bank v. Whitman*, 94 U. S. 343, 347; *Leather Manuf. Bank v. Morgan*, 117 U. S. 96, 112. A bank paying out a depositor's money on a forged check cannot cast on the depositor the duty of seeking to recover it from the receiver. *Yarborough v. Banking Loan & Trust Co.*, 55 S. E. (N. C.) 296.

11 *Dana v. National Bank*, 132 Mass. 156, and other cases in Chap. XV. relating to pass-books. A person will be barred by his adoption of a signature knowing, or not knowing, that it is a forgery. *Casco Bank v. Keene*, 53 Me. 103; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Central Nat. Bank v. Copp*, 184 Mass. 328. See §24c.

12 *Armour v. Greene Co. State Bank*, 112 Fed. 631.

13 See ante §3, note 11.

it, left it with his clerk to draw the money at the time specified. Changing the date, he drew the money and departed. The bank contended that had the clerk not changed the date, but waited until the proper time, and then drawn the money, the depositor would have had no claim against the bank. The court readily admitted this claim, but, on the other hand, the clerk did otherwise, and the bank wrongfully paid the altered check. "The bank is from necessity responsible for any omission to discover the original terms and conditions of a check, once properly drawn upon it, because at the time of payment it is the only party interested in protecting its integrity, who has the opportunity of inspection, and it therefore owes the duty to its depositors."¹⁴

5. Duty of Drawee of Check Payable to Bearer or Endorsed in Blank.

A check drawn payable to bearer, or endorsed in blank, somewhat lessens the burden borne by the drawee, because the bank ordinarily is protected in paying such a check to the bearer and charging the amount to the account of the depositor.¹⁵ In like manner on a bona fide note or bill, which the maker has put into circulation with a forged endorsement, the holder may recover as upon a note payable to bearer.¹⁶ And the same rule has been applied to a payee who had no interest in a note, and who, it was intended, should not become a party to the transaction.¹⁷ And the same rule, says Justice Bronson, is applicable to the case of a bill put into circulation by the drawer with a forged endorsement thereon. A bona fide holder may treat it as a bill payable to bearer.¹⁸

¹⁴ *Crawford v. West Side Bank*, 100 N. Y. 50.

¹⁵ *Dodge v. National Ex. Bank*, 20 Ohio St. 234, 245; *Robarts v. Tucker*, 16 Q. B. 560; *Farmers' & Merch. Bank v. Bank of Rutherford*, 115 Tenn. 64.

¹⁶ *Meacher v. Fort*, 3 Hill (S. C.) 227.

¹⁷ *Foster v. Shattuck*, 2 N. H. 446.

¹⁸ *Coggill v. American Ex. Bank*, 1 N. Y. 113. In this case a partner drew a bill in the name of his firm on the plaintiff, payable to the order of B, forged B's name and had it discounted by a bank which, after endorsing

6. Duty of Drawee of Check Payable to Fictitious Payee.

Fictitious paper may be put into four classes: First, paper payable to a purely imaginary person, or thing, ships, etc. With this, the law has encountered no difficulty; it is regarded as payable to bearer and governed by the rules pertaining to such paper.¹⁹

Second, paper payable to a real person to whom has been unintentionally given a wrong name,^{*} but who assumes it. As was said concerning a check by a court in Indiana, "it was intended for a person, not a name. Names possess neither personality nor existence. They best serve to identify individuals.

it, sent it to the defendant for collection. The plaintiff after paying it discovered the forgery and then sued to recover back his money, but failed. Justice Bronson said: "The bank had a good title to the bill as against the drawers, and the payee, and that was a good title against all the world. The plaintiff has paid money for the drawers in pursuance of their request; and he has the same remedy against them that he would have had if the endorsement had been genuine." In *Poess v. Twelfth Ward Bank*, 43 N. Y. Misc. 43, a check the maker had endorsed in blank was stolen from him. He gave notice to the bank not to pay it, but it was presented and paid. The court held that as between the depositor and the maker, the former was entitled to payment. But if the depositor had refunded the money and taken the check, he would have been estopped from recovering thereon against the bank. *Ibid.* And if the check had been certified, the same principle would have applied; the bank would thereby have been exonerated as acceptor or principal debtor. *Ibid.*

19 Chap. XX. §12, *Rogers v. Ware*, 2 Neb. 29. Though a negotiable check made payable to a fictitious person or order is in effect payable to bearer, it applies only where it was so made with the knowledge of the party making it, and does not apply where the maker, supposing the payee to be a real person and intending payment to be made to such a person or his order is induced by the fraud of another to thus draw it. *Dodge v. National Ex. Bank*, 30 Ohio 1; *Tatlock v. Harris*, 3 Term (Eng.) 174, 180; *Gibson v. Minet*, 1 H. Black. (Eng.) 569; *Collis v. Emett*, 1 H. Black. 313; *Gibson v. Hunter*, 2 Black. 187; *Forbes v. Espy*, 20 Ohio St. 483; *Armstrong v. National Bank*, 46 Ohio St. 512. "The statutory rule which gives to paper drawn payable to the order of a fictitious person and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker, with knowledge that the name of the person does not represent a real person." *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 561; *Shipman v. Bank*, 126 N. Y. 318; *Egner v. Corn Ex. Bank*, 42 N. Y. Misc. 552. See *Tolman v. American Nat. Bank*, 22 R. I. 462.

The check was received by the identical person or individual to whom its drawer intended to deliver it, and was by that person endorsed in the name in which it was issued to him.”²⁰ Such an endorsement is effectual to pass the title to the check.

Third, paper payable to a person of the same name as the intended payee, but not the same person. To endorse this is a forgery, a fraud, and conveys no title. The true owner can recover the paper wherever he can find it, and the drawer’s account cannot be charged by the wrongful payment.²¹

Fourth, paper payable to and delivered by the maker to a person bearing the same name as the person mentioned, but who is not the same person, in truth, is an impostor. As the maker made the primary mistake in making the paper and putting it in the possession of the forger to commit the fraud, the more widely adopted rule is, that he, rather than the drawee, must be the loser.²² One of the reasons for maintaining this view is the intention with which the drawer issued the

²⁰ Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322, 329; Meyer v. Indiana Nat. Bank, 27 Ind. App. 354; Metzger v. Franklin Bank, 119 Ind. 359; Karoly Construction Co. v. Globe Sav. Bank, 64 Ill. App. 225; Crippen v. American Nat. Bank, 51 Mo. App. 508; Robertson v. Coleman, 141 Mass. 231; Dunbar v. Boston & Prov. Railroad Corporation, 110 Mass. 26.

²¹ Graves v. American Ex. Bank, 17 N. Y. 205; Third Nat. Bank v. Merchants’ Nat. Bank, 76 Hun 475, 478; Faris v. Peck, 10 Abb. (N. Y. N. S.) 55; Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85; First Nat. Bank v. Pease, 168 Ill. 40, affg. 68 Ill. App. 562.

²² Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, second trial, 211 Pa. 211; Burrows v. Western Union Tel. Co., 86 Minn. 499; Emporia Nat. Bank v. Shotwell, 35 Kan. 360; Maloney v. Clark & Co., 6 Kan. 82; United States v. National Ex. Bank, 45 Fed. 163; Hoge v. First Nat. Bank, 18 Ill. App. 501; Hoffman v. American Ex. Nat. Bank, 2 Neb. (Unof.) 217. In one of the latest cases the court said: “While there are a few cases which hold to the contrary, yet the majority of the decisions, which we think contain the better reasoning, hold that where a drawer of a check, draft, or bill of exchange has been induced through fraud to deliver it to an impostor, believing him to be the person named in the check, draft, or bill of exchange, and the impostor negotiates the instrument, and receives payment thereon from an innocent third party, as between the bona fide holder and drawer, the latter must stand the loss.” Heavey v. Commercial Nat. Bank, 27 Utah 222, 228.

check has been carried out; payment has been made to the intended person. There has been no mistake of fact, except the mistake which he made in issuing the check; and the loss was due, not to the payor's error in failing to carry out the drawer's error, but primarily his own error in mistaking the payee. Since then the primary, and indeed only, fault was the drawer's, why should the consequences be visited on the drawee?²³

The negative view is sustained by the following reasoning: If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such a person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precaution in the one case as in the other, and so determine whether the endorsement is a genuine one or not. The fact that the payee is a non-

²³ A who falsely represented himself to be H, living in Fort Worth, Texas, sought through an agent B, to borrow money secured by a mortgage on H's land in Denver. C was willing to lend the money. H's note and mortgage were sent to B, who procured the money of C, and a draft for the amount drawn by a Denver bank on one in New York was sent to H. A Fort Worth bank discounted the draft and sent it to New York for collection. The New York bank accepted it, but, before paying, learned the history of the transaction and declined to pay. In an action by the Fort Worth bank against the drawee it was decided that, although the signatures to the note and deed were forgeries, the holder had obtained the draft in good faith from the person purporting to be H, to whom it was sent and for whom it was intended, and could be enforced. First Nat. Bank of Fort Worth v. American Ex. Nat. Bank of New York, 49 N. Y. App. Div. 349. The recovery was based on the familiar principle that if two innocent persons must suffer for the act of a third, he who enabled the latter to do the act must suffer the loss. Rawls v. Deshler, 4 Abb. Ct. of App. Dec. 12; McWilliams v. Mason, 31 N. Y. 294. A, on receipt of a release, procures a draft payable to his own order, endorses it to B's order and sends it by mail to B's address, who receives it and gets it cashed. B, who is active in this transaction, is an impostor and not the B whom A supposes. Nevertheless, A has no right of action against the bank that pays B the money. The bank is innocent, and acquires a good title to the paper. Hoffman v. American Ex. Bank, 2 Neb. (Unof.) 217.

existing person does not increase the liability of the bank to be deceived by the circumstances.²⁴ Does not this rule, holding the bank responsible for paying on a forged endorsement, overlook a rule not less imperative that the maker must use due care in making and using his check? Both parties in these cases fall into a great error, the maker in not knowing with whom he is dealing, the bank in paying on a forged endorsement. But the mistake of the maker is the first and greatest, for, had this not been made, the bank surely would not have erred.²⁵

²⁴ Armstrong v. National Bank, 46 Ohio St. 512; Shipman v. Bank, 126 N. Y. 318; Chism v. Bank, 96 Tenn. 641; Tolman v. American Nat. Bank, 22 R. I. 462. In Atlanta Nat. Bank v. Burke, 81 Ga. 597, a person forged another's name to a note and mortgage and procured a loan thereon, which was paid by a check to the supposed borrower. The payee's endorsement was forged to the check, the person procuring the loan adding his own endorsement. The bank on which the check was drawn was not protected by payment, though the last endorsement was genuine. In Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, a loan broker negotiated with an attorney in good repute a loan secured by land whose owner was in truth dead. The attorney forged the name of the deceased to the check sent by the broker, and it was paid by the bank. Nevertheless the bank, not the broker, was held to be negligent, and he recovered his money.

²⁵ In First Nat. Bank v. Farmers & Merchants' Bank, 56 Neb. 149, the local correspondent of a trust company presented an application for a loan, signed B, also an abstract of the land taken as security, showing B's title. The loan was made, the company sending to the local correspondent a check payable to B's order, which was presented to the defendant bank, bearing the endorsements of B and of the local correspondent. The bank paid the check to the correspondent, endorsed and sent it to an Omaha bank, which sent it to the drawee bank, which after paying the check, charged the amount to the drawer. After the discovery of the forgery, the drawee repaid the drawer, sued the defendant and Omaha bank and recovered, the court holding: (1) that if the application, bond and mortgage were executed by a third person, who endorsed the check, the endorsement was genuine, whether his real name was B or not; (2) that if the correspondent signed the application bond and mortgage, and endorsed the check, his acts were a forgery.

A balanced pass-book belonging to G. B. was sent by mail by mistake to G. W. B., who was persuaded by a creditor to give him a draft on the bank in payment of his debt. The draft was not paid, but the bank, on a telegraphic order from the son of G. W. B., whose name was the same as that of the real depositor, forwarded the money due by the book to a bank

7. Drawer Must Not be Negligent.

There is one important limitation. The drawer must not be guilty of any negligence in drawing his check, whereby an alteration can be easily made,²⁶ or contribute in any way to the success of the fraud, or to the mistake of fact about payment.²⁷ The mistake is a question to be ascertained by proper investigation. Not infrequently the drawee bank has sought to take advantage of this rule and throw the loss on the drawer. Occasionally, a bank has been able to prove a case of negligence on the part of the drawer in making his check, or giving it currency, but usually has failed in its contention.²⁸

8. Relief of Bank by Special Direction.

A bank, however, may be relieved from liability for payment to the wrong person, or under an endorsement not genuine when the circumstances of the case amount to a direction from the depositor to the banker to pay without reference to identification or to the genuineness of the endorsement.²⁹

9. Innocent Payee's Right to Keep the Money.

Not only has a bank no right to charge such a payment to its depositor, it cannot recover the money from the payee who was innocent and free from fault in demanding the money on the forged signature of the depositor.³⁰ This is a hard rule, and though often combatted still survives.

in the town where G. W. B. lived, which paid a check drawn by G. W. B. in favor of his creditor. Though the first bank took a note from G. W. B. for the amount of the check, it was not precluded from recovering from his creditor, as he took the check, knowing that G. W. B. was not the real depositor. *Merchants' Bank v. Superior Candy Co.*, 84 Pac. (Wash.) 604.

²⁶ *Crawford v. West Side Bank*, 100 N. Y. 50, 55; *Burnet Woods Sav. Co. v. German Nat. Bank*, 4 Ohio Dec. 290.

²⁷ *Iron City Nat. Bank v. Payton*, 15 Tex. Civ. App. 184; *Exchange Nat. Bank v. Bank of Little Rock*, 7 C. C. A. 111; *Young v. Grote*, 4 Bing. (Eng.) 253; *Marshall v. Colonial Bank*, 29 Vict. Law Rep. 986.

²⁸ Woods case, 4 Ohio Dec. 290.

²⁹ *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229; *Burnet Woods Sav. Co. v. German Nat. Bank*, 4 Ohio Dec. 290.

³⁰ *Price v. Neal*, 3 Burr. (Eng.) 1354; *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207;

It runs against the great rule, that money paid by mistake may be recovered back, which is constantly growing in judicial favor.³¹ Says Justice Rapallo: "The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal, and are molded so as to do equity between the parties."³² As the denial of its recovery is an exception, the modern tendency is not to extend its operation. The exception is founded on the reason that the bank is familiar with the maker's signature or presumed to be, while the holder may not be, therefore the rule is not too severe in denying a recovery by the bank against an innocent presentor. Says the court in a recent case: "The law imputes to the drawee a knowledge of the drawer's signature; and where he pays the bill to which the name of the drawer has been forged, he is guilty of negligence in not applying the knowledge imputed to him, and he will not be permitted to recover the proceeds of the bill from a bona fide holder."³³

The reason for denying a recovery to the drawee is negligence. To this may be added the reason that there must be

Neal v. Coburn, 92 Me. 139; Gloucester Bank v. Salem Bank, 17 Mass. 33; First Nat. Bank v. First Nat. Bank, 151 Mass. 282; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392; Goddard v. Merchants' Bank, 4 N. Y. 147; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 80; Bank of St. Albans v. Farmers' & Mech. Bank, 10 Vt. 141; First Nat. Bank v. Marshalltown State Bank, 107 Iowa 327; Redington v. Woods, 45 Cal. 406; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10; Commercial Nat. Bank v. National Bank, 30 Md. 11; Germania Bank v. Boutell, 60 Minn. 189; Star Fire Ins. Co. v. Nat. Bank, 60 N. H. 442; Iron City Nat. Bank v. Peyton, 15 Tex. Civ. App. 184; Woods v. Colony Bank, 114 Ga. 683, and cases cited.

31 Canadian Bank v. Bingham, 30 Wash. 484; First Nat. Bank v. First Nat. Bank, 151 Mass. 282; First Nat. Bank v. Ricker, 71 Ill. 439; First Nat. Bank v. State Bank, 22 Neb. 769; DeFeriet v. Bank, 23 La. Ann. 310. In First Nat. Bank v. Marshalltown State Bank, 107 Iowa 327, the court said: "When the holder of the check has been negligent in not making due inquiry when he took the check the drawee may recover." See Germania Bank v. Boutell, 60 Minn. 189, for a discussion of the rule.

32 National Bank v. National Mechanics' Bkg. Assn., 55 N. Y. 211, 215.

33 Farmers' & Merch. Bank v. Bank of Rutherford, 115 Tenn. 64.

some place for the final settlement of such transactions, and the drawee bank is deemed the most appropriate place.³⁴ Justice Mitchell in giving these reasons, has sought to strengthen his conclusion by the analogy that a bank which pays a check under the misconception that it has the funds of the drawer cannot recover them; its action is final. But the analogy is imperfect. In thus paying a check under the supposition that the drawer's fund is ample, the bank always has adequate evidence in its possession of the true state of the drawer's account. If, therefore, it pays without examining the record, it may well be held responsible for its negligence; for ordinarily there is no excuse in any case of doubt. But in paying forged checks a bank is not always negligent in failing to discover them; in many cases the drawer himself fails in his examination. In those cases wherein the bank is truly negligent in not discovering the forgery, it may well be held responsible for its conduct; but in others, wherein the discovery is made only after careful scrutiny, the rule we think is unreasonable to hold the institution liable therefor. The law should distinguish between cases of presumptive and real negligence. Presumptively, it may be negligent in all, but when the truth is otherwise, the bank should be permitted to disclose the fact and recover unless the payee would be worse off than he was before receiving payment. It is true that the courts have not yet strongly assailed the rule; the most noteworthy exception perhaps is the Canadian Bank of Commerce case by the Supreme Court of Washington.³⁵ Many of them are alive to its hardships and the need of a modification, but are looking to the legislature for action. Probably had the rule not existed so long and so generally, courts would be less reluctant to make the modification so seriously required.

A depositor is not presumed to know the signature of the

34 Germania Bank v. Boutell, 60 Minn. 189, 192; First Nat. Bank v. Marshalltown State Bank, 107 Iowa 327, 329.

35 30 Wash. 484.

payee of his check, and therefore is not guilty of negligence in not discovering its forgery when this has happened.³⁶

The question of recovery may arise between other innocent parties beside bank and depositor. To trace the rights of all would take us too far afield. Recovery may be attempted between an innocent drawee and payee. "Usually, when one of two parties equally innocent must suffer, the law leaves the loss where it has chanced to fall."³⁷ An innocent drawee, therefore, cannot recover of the payee the amount of a bill which he has accepted and paid, on the ground that he was mistaken concerning the nature of his security that accompanied the bill and proved to be fictitious. Says Justice Cooley: "The law merchant gives the payees the right to assume that any draft they receive and forward, if it is accepted and paid, is a draft which, from the state of the dealings between drawers and drawees, it is right and proper that the latter should pay as the principal party; and the presumption of law that such is the case is then complete protection if they received the bill in the ordinary course of business and for value."³⁸

Again, a recovery may be attempted by an innocent payee and drawer. Thus, a check is issued, afterward raised and taken for full value by an innocent purchaser. Who is to bear the loss? In a recent case the Circuit Court of Appeals, after remarking on the contrariety of opinion, absolves the drawer, because the forgery, which was the proximate cause of the loss, was not the drawer's act. Both parties were innocent, and it was the buyer's duty, and not the drawer's, "to then see that it was genuine."³⁹

Indeed, one who purchases a check or draft is bound to

36 Brixen v. Deseret Nat. Bank, 5 Utah 504.

37 Cooley, J., First Nat. Bank v. Burkham, 32 Mich. 328, 331.

38 *Ibid.*

39 Exchange Nat. Bank v. Bank of Little Rock, 7 C. C. A. 111, citing Holmes v. Trumper, 22 Mich. 427; Greenfield Sav. Bank v. Stowell, 123 Mass. 196; Burrows v. Klunk, 70 Md. 451; Knoxville Nat. Bank v. Clark, 51 Iowa 264; Fordyce v. Kosminskie, 49 Ark. 40; Goodman v. Eastman, 4 N. H. 455.

satisfy himself that the paper is genuine; and that by endorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed his duty. Consequently, it is held that if it appears that he has neglected this duty, the drawee, who has, without actual negligence on his part, paid the forged demand, may recover the money paid from the negligent purchaser. The recovery is permitted in such cases, because, although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty, the forgery would, in all probability, have been detected and the fraud defeated.⁴⁰

10. Drawee Alone Must Have Been at Fault.

To retain the money, the bank alone must be at fault.⁴¹ In the case of a forgery this would clearly be, were the face of the paper presented for payment, so altered as to excite a reasonable suspicion of fraud, or were the bank in possession of information that would lead a prudent person to suspect that the paper had been altered.⁴²

On the other hand, if negligence can be visited on the payee, he must repay.⁴³ In the case that has been often

⁴⁰ First Nat. Bank v. Bank of Wyndmere, 108 N. W. (N. Dak.) 546, 548, citing many cases. A drawer put a bill of exchange containing the forged endorsement of the payee into circulation. It was purchased by an innocent holder, who presented it to the drawee, by whom it was accepted and paid at maturity. Afterward the drawer failed. The drawee could not recover the money from the bona fide payee. Horstman v. Henshaw, 11 How. (U. S.) 177.

⁴¹ Rouvant v. San Antonio Nat. Bank, 63 Tex. 610; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10; First Nat. Bank v. Ricker, 71 Ill. 439; McKleroy v. Southern Bank, 14 La. Ann. 458; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 395; Young v. Adams, 6 Mass. 182.

⁴² Ibid.

⁴³ First Nat. Bank v. Ricker, 71 Ill. 439; Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628; Woods v. Colony Bank, 116 Ga. 683; McKleroy v. Southern Bank, 14 La. Ann. 458; Rouvant v. San Antonio Nat. Bank, 63 Tex. 610; National Bank v. Bangs, 106 Mass. 441. In one of the latest cases, First Nat. Bank v. Bank of Wyndmere, 108 N. W. (N. Dak.) 546, 548, the court said: "Most of the courts now agree that one who purchases a check or draft is bound to satisfy himself that the paper is genuine; and

cited with approval the court said: "The responsibility of the drawee who pays a forged check for the genuineness of the drawer's signature is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud or to mislead the drawee."⁴⁴ Not infrequently he is proved to have been negligent; then the bank recovers. Again, when both are negligent or free from negligence, the payee can recover.⁴⁵ Lastly, when negligence can be traced to one of the parties, that party must suffer.⁴⁶

11. Rule Covers Bank Correspondents.

The rule existing between bank and depositor has been stretched in the banking world to cover drafts drawn by correspondents. A draft therefore drawn by a bank which corresponds with another is on the same plane as a depositor's check; the drawee is legally required to know its signature and is responsible as if it were a depositor for disregarding the rule.⁴⁷ Furthermore, the rule applies to bills either paid on presentment, or accepted and afterwards paid.⁴⁸

that by endorsing it or presenting it for payment or putting it into circulation before presentation he impliedly asserts that he has performed his duty. Consequently it is held that if it appears that he has neglected this duty, the drawee who has, without actual negligence on his part, paid the forged demand, may recover the money paid from such negligent purchaser. The recovery is permitted in such cases because, although the drawee was constructively negligent in failing to detect the forgery, yet if the purchaser had performed his duty the forgery would, in all probability, have been detected and the fraud defeated," citing many cases.

44 National Bank v. Bangs, 106 Mass. 441, 444. The court continued: "If the payee took the check drawn payable to his order, from a stranger or other third person, without inquiry, although in good faith and for value, and gave it currency and credit by endorsing it before receiving payment of it, the drawee may recover back the money paid." See remarks of the court in Woods v. Colony Bank, 114 Ga. 683.

45 Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628; Bernheimer v. Marshall, 2 Minn. 78.

46 First Nat. Bank v. Tappan, 6 Kan. 456; Gloucester Bank v. Salem Bank, 17 Mass. 33; Clews v. Bank, 114 N. Y. 70.

47 National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77; National Bank v. Bangs, 106 Mass. 441, 444; Moody v. First Nat. Bank, 19 Tex.

12. Reason for Rule Restricting Forgery to Drawer's Signature.

Why should the application of the rule be denied to strangers? As we have shown, the rule is onerous even in rendering a bank responsible to its depositors for payments made on their forged signatures.⁴⁹ The rule with respect to them also covers alterations or forgeries in the body of a check, because it has expressly or impliedly agreed to be responsible.⁵⁰ It is under no obligation to strangers because they give nothing directly or indirectly for such protection.⁵¹ "To require the drawee," says Justice Ruggles in a well-known case, "to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face."⁵²

It is true that the courts have sometimes said or intimated that the drawee bank was responsible to its depositor only for a forgery of his signature, as his checks are often filled up by persons with whose handwriting the bank officials are not familiar.⁵³ But whatever they may have recently said, they are still held to the ancient requirement. The rule is thus stated in a well-known English case: "If the banker unfortunately pays money belonging to the customer upon an order not genuine he must suffer, and to justify the payment he must show

Civ. App. 278. See references in brief, *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 640.

48 *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 81, citing *Bank of St. Albans v. Farmers' & Mech. Bank*, 10 Vt. 141; *Levy v. Bank*, 4 Dall. (U. S.) 234; *Bank v. Bank*, 10 Wheat. (U. S.) 333; *Young v. Adams*, 6 Mass. 182; *Gloucester Bank v. Salem Bank*, 17 Mass. 33.

49 See §3.

50 *Crawford v. West Side Bank*, 100 N. Y. 50.

51 *Bank v. Union Bank*, 3 N. Y. 230.

52 *Bank v. Union Bank*, 3 N. Y. 230, 236; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; *White v. Continental Nat. Bank*, 64 N. Y. 316; *Crawford v. West Side Bank*, 100 N. Y. 50; *Crane v. Dexter*, 5 Wash. 479.

53 See *Redington v. Woods*, 45 Cal. 406.

that the order was genuine, not in the signature only, but in every respect."⁵⁴ In Crawford's case the alteration consisted simply in altering the date by two days of a post-dated check, yet the court declared that the bank was responsible to the drawer for the amount.⁵⁵

13. In Other Cases Drawee Can Recover Raised Check.

The drawee bank, therefore, is denied a recovery from the non-depositor payee only in cases of forgery of the drawer's name. This limitation is founded on the solid reason that as between bank and payee no especial obligation exists for detecting forgeries in dates, amounts, and other details.⁵⁶ The rule existing between bank and depositor is not broad enough to include a stranger.⁵⁷ Therefore a bank that has paid a raised check, for example, can recover the raised amount from the payee or holder.⁵⁸

54 Hall v. Fuller, 5 B. & C. (Eng.) 750.

55 Crawford v. West Side Bank, 100 N. Y. 50.

56 Crawford v. West Side Bank, 100 N. Y. 50; Bank v. Union Bank, 3 N. Y. 320.

57 For cases see §10, note 44.

58 Espy v. Bank, 18 Wall. (U. S.) 604; Redington v. Woods, 45 Cal. 406; Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564; Parke v. Roser, 67 Ind. 500; Third Nat. Bank v. Allen, 59 Mo. 310; National Bank v. Manuf. & Traders' Bank, 122 N. Y. 367; U. S. Nat. Bank v. National Park Bank, 129 N. Y. 647; Bank v. Union Bank, 3 N. Y. 230; National Bank v. National Mechanics' Bkg. Assn., 55 N. Y. 211; Marine Nat. Bank v. National City Bank, 59 N. Y. 67; White v. Continental Nat. Bank, 64 N. Y. 316; Security Bank v. National Bank, 67 N. Y. 458; National City Bank v. Wescott, 118 N. Y. 468; Clews v. Bank, 89 N. Y. 418; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475; Oppenheim v. West Side Bank, 22 N. Y. Misc. 722; City Bank v. First Nat. Bank, 45 Tex. 203; Merchants' Bank v. Exchange Bank, 16 La. 457, but see La. Nat. Bank v. Citizens' Bank, 28 La. Ann. 189; Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367. A man bought a draft for \$500, payable to a third person's order. At the top was the correct amount in figures, but in words were written five thousand dollars. The buyer did not examine it, and the cashier at his request enclosed it in an envelope and sent it with the bank's mail. Some one added a cipher to the \$500, and the drawee paid \$5,000. The bank and not the buyer was the loser by the mistake. City Nat. Bank v. Stout, 61 Tex. 567.

14. Recovery of Money Credited to Depositor on Forged Check.

A bank that credits the account of a depositor with a forged check can follow the money into the possession of one who has received it with knowledge of the fraud.⁵⁹

15. Recovery of Money Paid on Forged Endorsement.

In like manner a drawee bank can recover money paid on a forged endorsement.⁶⁰ The endorsement of the payee is regarded as a warranty of the genuineness of all the prior endorsements;⁶¹ should, therefore, one of them prove to be forged, the payee's title is in truth imperfect and he must refund the money. The warranty does not include the genuineness of the maker's signature, but only those of subsequent holders in due course of trade. The drawee of the check is the correct party to pass on the genuineness of the signature of the drawer.⁶²

The endorsement does not import an unaltered amount. The right to recover the money, therefore, when a check has been raised does not rest on the endorser's promise to refund, but on lack of consideration and that the payment was by mistake.⁶³

And this rule applies with especial force to a non-drawee bank that pays a check without proper inquiry, endorses it, and sends it to the drawee bank for payment. As the non-drawee

59 Fidelity Trust Co. v. Baker, 60 N. J. Eq. 170.

60 First Nat. Bank v. State Bank, 22 Neb. 769; Gueydon v. Quintainville, 2 Willson Civ. Cases (Tex.) §617; Canadian Bank v. Bingham, 30 Wash. 484; Corn Ex. Bank v. Nassau Bank, 91 N. Y. 74; Merchants' Bank v. McIntyre, 2 Sand. (N. Y.) 431; Central Nat. Bank v. North River Bank, 44 Hun (N. Y.) 114; Egner v. Corn Ex. Bank, 42 N. Y. Misc. 552; Cochran v. Atchison, 27 Kan. 726.

61 First Nat. Bank v. Marshalltown State Bank, 107 Iowa 327; Levy v. First Nat. Bank, 27 Neb. 557; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296; Williams v. Tishomingo Sav. Institution, 57 Miss. 633; Canal Bank v. Bank, 1 Hill (N. Y.) 287; Bank v. Union Bank, 3 N. Y. 230; Turnbull v. Bowyer, 40 N. Y. 456; White v. Continental Nat. Bank, 64 N. Y. 316, 320; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475; Oppenheim v. West Side Bank, 22 N. Y. Misc. 722.

62 Farmers' & Merch. Bank v. Bank of Rutherford, 115 Tenn. 64.

63 Redington v. Woods, 45 Cal. 406.

bank is under no obligation whatever to pay, it does so at its peril; this is a well-known rule. Before paying such a check on request to a stranger, it should require identification and proof that he is the lawful holder. For the drawee bank may rightfully assume that the other insisted on these preliminaries before paying. And there is the greater need for doing this because the other cannot do these things. Therefore, if the first pays on a forged endorsement and thereby misleads the other, it can recover the amount paid, for the probability is, had the first bank done its duty, the check would not have been paid.⁶⁴

Again, a drawee bank which pays to the owner a check containing a forged endorsement cannot recover the amount from him on the ground that he is a guarantor of the prior forged endorsement. For as "the money is paid to the party entitled to it, the drawee has no reason to complain and no right of action over."⁶⁵

With respect to interest a bank that pays a check on a forged endorsement can recover interest on the amount thus paid from the time of payment, if it has been compelled to keep an additional deposit to cover the payment.⁶⁶

Lastly, in the proceedings to recover on a forged endorsement, the burden of proof is on the plaintiff.⁶⁷

16. Recovery by True Payee of Drawee Bank.

By paying on a forged endorsement, the true payee can maintain an action thereon, not only in the states where the assignment rule prevails, but in some others.⁶⁸ The better

64 National Bank v. Bangs, 106 Mass. 441; Western Union Tel. Co. v. Bi-Metallic Bank, 17 Colo. App. 229; Canadian Bank v. Bingham, 30 Wash. 484; First Nat. Bank v. State Bank, 22 Neb. 769; Wellington Nat. Bank v. Robbins, 81 Pac. (Kan.) 487.

65 First Nat. Bank v. Marshalltown State Bank, 107 Iowa 327.

66 German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa 530.

67 National Park Bank v. American Ex. Bank, 88 N. Y. Supp. 271.

68 Seventh Nat. Bank v. Cook, 73 Pa. 483; Pickle v. Muse, 88 Tenn. 380; Dodge v. National Ex. Bank, 20 Ohio St. 234. Perhaps the Ohio courts would not sustain this rule, now, since discarding the assignment doctrine.

rule does not recognize his right to sue⁶⁹ in harmony with the almost universal principle that a holder cannot sue the drawee bank unless it has accepted or promised to pay the check or other instrument. Nevertheless, payment by the drawee bank to an innocent holder in good faith is no excuse for not paying the true owner when he appears.⁷⁰

17. Effect of Endorsement by Agent.

When a bank pays a check endorsed by an agent it must assure itself of his authority, or accept the consequences of acting without sufficient knowledge. As his authority to endorse can be implied only when such action is needful to perform the duties of his agency effectively, in other cases it must be clearly known to yield to the paying bank perfect protection.⁷¹

69 First Nat. Bank v. Whitman, 94 U. S. 343; J. M. Houston Grocer Co. v. Farmers' Bank, 71 Mo. App. 132; Freeman v. Savannah Bank, 88 Ga. 252.

70 Henderson Trust Co. v. Ragan, 21 Ky. L. Rep. 601; First Nat. Bank v. Whitman, 94 U. S. 343; Citizens' Nat. Bank v. Importers & Traders' Nat. Bank, 119 N. Y. 195; Kimbro v. First Nat. Bank, 1 MacArthur (D. C.) 415; United States v. National Bank of the Republic, 2 Mackey (D. C.) 289; Star Fire Ins. Co. v. N. H. Nat. Bank, 60 N. H. 442; Graves v. American Ex. Bank, 17 N. Y. 205; Indiana Nat. Bank v. Koltsclaw, 98 Ind. 85. The payee of a check who misleads the drawer to his prejudice by not informing him that his check had been stolen or paid on a forged endorsement cannot recover from him. Shepard & Morse Lumber Co. v. Eldridge, 171 Mass. 516.

71 Jackson Paper Mfg. Co. v. Commercial Bank, 199 Ill. 151; Commercial Nat. Bank v. Lincoln Fuel Co., 67 Ill. App. 166; Doubleday v. Kress, 50 N. Y. 410; Railway Equipment Co. v. Lincoln Nat. Bank, 82 Hun (N. Y.) 8; Atkinson v. St. Croix Mfg. Co., 24 Me. 176; Smith v. Gibson, 6 Blackf. (Ind.) 369; N. Y. Iron Mine v. First Nat. Bank, 39 Mich. 644; Jackson v. McMinnville Nat. Bank, 92 Tenn. 154. An insurance agent sent in death claims to the head office signing the names of the claimants, whereupon checks for the respective amounts were sent to him, payable at a branch of the Molsons Bank. He forged the names of the payees, the checks were presented to the bank and paid in good faith and the amounts were charged to the company. The company was precluded from disputing the action of the bank in paying the checks and it was therefore obliged to bear the loss. "It would be a startling thing, at all events to business men, if it were to be held that a banker paying the checks of his customer under the circumstances described, should be bound

Therefore, the fraudulent endorsement of a check by the payee's clerk conveys no title to a person who had no knowledge of his authority to endorse for any purpose.⁷² The nature of the proof of his authority of course is greatly varied.

Suppose a forgery is committed by an agent of the drawer, is he responsible for his agent's conduct? Thus a bank issued a draft for \$25 to one of its employes whose duty in part was to prepare drafts for the bank's cashier to sign. The employe prepared the draft in such a way that it was easy to add two ciphers without the possibility of detection by an outsider. After the cashier had signed the draft the employe added the

to suffer the loss occasioned by the fraud committed by the person whom the customer had entrusted with the powers and duties which were entrusted to" the agent in this case. London Life Ins. Co. v. The Molsons Bank, 5 Ont. Law Rep. (Can.) 407.

A company's bookkeeper had authority to endorse checks payable by D bank, which came monthly to his company, for the purpose of depositing them to its credit. The D bank was held not liable for the amount of a check which the bookkeeper endorsed and negotiated to another party. The fact that the check bore an additional endorsement was not enough to put the bank on inquiry. Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182.

72 Citizens' Nat. Bank v. Importers & Traders' Nat. Bank, 119 N. Y. 195. A and B were trustees of an estate, the latter as exclusive manager. He employed C as his clerk to collect rent who, on one occasion received a check payable to B's order, which C endorsed to his own order, signing B's name, per himself, as attorney. He then endorsed it "for deposit" with the Chemical Bank, signing his own name. The bank collected the check and C drew out the amount. Yet the bank was liable to the trustees therefor, because C had no authority to endorse the check and collect the proceeds. Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Graham v. U. S. Savings Institution, 46 Mo. 186; Holtsinger v. National Corn Ex. Bank, 6 Abb. Pr. N. S. (N. Y.) 292; Thomson v. Bank of Rochester, 82 N. Y. 1, 10. Likewise their successors could have the same right to an action against the bank. Ibid. Talbot v. Bank, 1 Hill (N. Y.) 295; Johnson v. First Nat. Bank, 6 Hun 124; Boyce v. Brockway, 31 N. Y. 490. A was styled "cashier" in a public treasurer's office, he kept the ledger, cash book and bank pass-books, made deposits and petty disbursements, but had no authority to endorse drafts, and was expressly prohibited from doing so. The state therefore could recover the amounts of drafts, which he had thus wrongfully endorsed, from the bank, which collected them from the drawers. People v. Bank of North America, 75 N. Y. 547. Nor did the treasurer's failure to disapprove of the clerk's action on one or two former

ciphers and negotiated the draft. A bank that discounted it sued the drawer, but failed to recover, the court holding that the employe was a purchaser, and that after he bought the draft the raising of the amount was his sole act, for which the bank was in no way responsible.⁷³

A mere collector for a firm has no authority to endorse a check payable to its order. Therefore, if he forges the firm's endorsement, and procures the money from the drawee bank, the firm, after obtaining an assignment of all the rights of the drawers of the check, may recover the amount from the bank.⁷⁴

18. Recovery from Agent.

An unknown payee, who happens to be an agent, is liable to the drawee bank as if he were the principal.⁷⁵ To a known agency a somewhat different rule applies. If he has not paid over the money to his principal, so that his condition would be the same, no matter whom he paid, then he must repay the payor; but if he has paid the money over to the principal, then the payor must look to the principal, if to any one.⁷⁶

occasions in endorsing drafts operate to confer on him authority to endorse. *Ibid.* A bank that makes a loan through an agent and gives him a check for the proceeds, payable to the borrower, whose name is forged by the agent, is not liable to another bank that discounts the check. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530; *Welsh v. German-Am. Bank*, 73 N. Y. 424; *Citizens' Nat. Bank v. Imp. & Traders' Bank*, 119 N. Y. 195; *Weisser v. Denison*, 10 N. Y. 68. A power of attorney to prosecute a claim against the United States and to receive any check issued by it in payment confers no authority to endorse a check thus received in the payee's name. *Millard v. National Bank of the Republic*, 3 McArthur (D. C.) 54.

73 *Exchange Nat. Bank v. Bank of Little Rock*, 7 C. C. A. 111.

74 *Adler v. Broadway Bank*, 30 N. Y. Misc. 382.

75 *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Star Fire Ins. Co. v. N. H. National Bank*, 60 N. H. 442, 446; *MERCHANTS BANK v. M'INTYRE*, 2 Sand. (N. Y.) 431; *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 577.

76 *Espy v. Bank*, 18 Wall. (U. S.) 604, 618; *United States v. American Ex. Nat. Bank*, 70 Fed. 232; *Redington v. Woods*, 45 Cal. 406; *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; *National Park Bank v. Ninth Nat. Bank*,

Though the rule is understood, there is difficulty sometimes in applying it, especially in determining whether the proceeds have been returned or not. If they have been, there is no question, but sometimes there is a mere crediting without any actual transfer of proceeds. When there are actual credits these will suffice, but nothing less will satisfy the law.

A telegraph company whose regular business is to transmit money-order messages between banks is liable to a bank for a loss caused by its payment, without negligence, of such an order which is forged and transmitted through the company's regular agents. For, while an agent's act in transmitting a false message is fraudulent and unauthorized, it is within the apparent scope of his employment.⁷⁷

19. Paper from Agent "for Collection."

A bank that endorses paper "for collection" and sends it to the drawee for payment, and, after receiving the money, pays the same over to the owner or sender of the paper is not liable to refund the money to the drawee should the discovery be made afterward that the paper is a forgery. The collecting bank by such an endorsement does not guarantee the genuineness of the paper.⁷⁸

46 N. Y. 77; U. S. Nat. Bank v. National Park Bank, 129 N. Y. 647; White v. Continental Bank, 64 N. Y. 316; Bank v. Union Bank, 3 N. Y. 230; Nat. City Bank v. Westcott Ex. Co., 118 N. Y. 468; Clews v. Bank, 89 N. Y. 418; Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287; National Park Bank v. Eldred Bank, 90 Hun (N. Y.) 285; La Farge v. Kneeland, 7 Cow. 456, 460; Mowatt v. McLean, 1 Wend. (N. Y.) 173; Herrick v. Gallagher, 60 Barb. (N. Y.) 566; Birmingham Nat. Bank v. Bradley, 103 Ala. 109; Alabama Nat. Bank v. Rivers, 116 Ala. 1, 17. An agent for the collection of a check endorsed for that purpose collected the amount. The payee's name had been forged. The drawee could rightfully demand of the agent the money. Merchants' Bank v. M'Intyre, 2 Sand. (N. Y.) 431.

77 Bank of Palo Alto v. Pacific Postal Tel. Co., 103 Fed. 841, reviewing many cases.

78 Northwestern Nat. Bank v. Bank, 107 Mo. 402; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207; National Park Bank v. Seaboard Bank, 114 N. Y. 28; Moody v. First Nat. Bank, 19 Tex. Civ. App. 278.

Contra.—First Nat. Bank v. First Nat. Bank, 4 Ind. App. 355, and 9 Ind. App. 185.

The limitation to the above rule must not be overlooked. While a collecting agent that has paid over the money to its principal is not responsible to the drawee as above explained, this rule cannot be invoked by a bank that is the owner of a check sent to another for collection. If paid on a forged endorsement it must be repaid. In a recent case the check was endorsed "pay to any national bank or order," and in the letter enclosing the check the cashier stated that it was forwarded for collection. But the court interpreted these words as meaning that "the check was to be collected for it, not that it was collecting the check for another."⁷⁹

As the ordinary restrictive endorsement "for collection" and the like is no warranty of the genuineness of the preceding signatures and was not intended to be,⁸⁰ but precisely the opposite to escape all liability, there can be no recovery thereon after the agent has paid over the money. Payees have sought to strengthen their hold on agents by insisting on new requirements. Accordingly, the leading clearing houses require all endorsements to be guaranteed in order to gain some protection from those who seek shelter from responsibility for paper presented by them for payment. For, we have seen, when paper is thus endorsed in an unqualified manner the endorser is responsible for its genuineness.⁸¹

The rule may be expressed more broadly. The drawee bank cannot recover when it has been negligent and the payee would be put in a worse condition than it would have been had it not received the money. Thus a check drawn on a New York bank was received and negligently paid after it had received knowledge of the forgery. The payee bank, after receiving the money, paid it over, and if it had been obliged to refund, would

79 First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 135.

80 National Park Bank v. Seaboard Bank, 114 N. Y. 28; First Nat. Bank v. City Nat. Bank, 182 Mass. 130. See Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 394.

81 For full explanation of this clearing-house regulation, see First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207.

have been the loser. In such a case repayment cannot be demanded.⁸²

20. By Repaying the Drawee an Innocent Holder Acquires No Right Against Prior Holder.

Again, should the innocent payee or holder repay at the drawee bank's request the money received, he would not thereby acquire the right to recover from a prior innocent holder for value who has endorsed the instrument.⁸³

21. Recovery on Paper Containing Forged Signature and Endorsement.

Should a check contain both a forged signature and endorsement, can the payee escape from refunding? The drawee bank is bound to know the signature of its customer.⁸⁴ The holder is bound to have a good title to the paper presented.⁸⁵ Much may be said in favor of either rule.⁸⁶

22. Recovery on Forged Discounted Paper.

A bank on the discovery that it has discounted a note with a forged endorsement has a right to charge the amount to the depositor's account, for whose benefit it was discounted. This in effect is the withdrawal of the credit given to him in the beginning.⁸⁷

⁸² Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272. By the Negotiable Instruments law an endorser for collection warrants to all subsequent holders in due course that the instrument is at the time of his endorsement valid and subsisting.

⁸³ Neal v. Coburn, 92 Me. 139.

⁸⁴ First Nat. Bank v. Northwestern Nat. Bank, 40 Ill. App. 640, affd. 152 Ill. 296, §3.

⁸⁵ Ibid.

⁸⁶ In First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, the bank was held.

Contra.—First Nat. Bank v. First Nat. Bank, 4 Ind. App. 355; Indiana Nat. Bank v. First Nat. Bank, 9 Ind. App. 185; Bank of England v. Vagliano, L. R. 1 App. Cas. (1891) 107, revg. L. R. 22 Q. B. Div. (Eng.) 103, and 23 Q. B. Div. 243.

⁸⁷ Cornelius v. Bank, 15 Pa. Super. Ct. 82. Nor is the bank on rescinding the contract required to surrender the note and thus part with the evi-

23. How Long is Bank Liable to Repay on Forged Check?

How long does the liability to repay continue? As a bank is not liable to refund when the depositor himself is guilty of negligence in so preparing a check as to invite the perpetration of the fraud for which he seeks to render his bank liable, so is he often negligent in not examining his checks promptly after they have been returned to him to ascertain whether any mistake has been made in paying them. Two rules exist on this subject,—one, that he must do so within a reasonable time, and, if neglecting, is cut off from making reclamation; the other, that no such duty is incumbent on him, nor is the account thus stated and returned by the bank beyond the range of attack if any erroneous or wrongful payment is discovered.⁸⁸ Moreover, while there is the longest possible diameter between these rules and the former is rapidly extending by reason of its more obvious reasonableness, the courts in New York, which is the chief stronghold of the other, have until recently manifested but little disposition to retrace.

24. Notice of Forgery.

(a.) Formerly, a failure to discover a forgery promptly cut off redress on its later discovery;⁸⁹ now, lapse of time be-

dence needful to justify its action. *Ibid.* A bank that takes a note from the second endorser may recover from him though the payee's name was forged and the note was discounted on the presentation of the maker. *State Bank v. Fearing*, 16 Pick. (Mass.) 533. An accommodation endorser is not presumed to know that a note is forged, and cannot be held thereon without demand, refusal and non-payment. *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207. A woman to shield her husband ratified a forged note he had made, owned by a bank. He afterward gave another forged note in renewal of the first. The substitution and acceptance by the bank of the second note was no bar to a recovery on the other. *Central Nat. Bank v. Coff*, 184 Mass. 328.

88 Chap. XV. §§ 6-13. "When parties have had mutual dealings and one renders to the other a statement purporting to set forth all the items of indebtedness on the one side and of credit on the other, the account so rendered if not objected to in a reasonable time, becomes an account stated and cannot afterwards be impeached except for fraud or mistake." *Lawrence v. Ellsworth*, 41 Ark. 502; *Dunavant v. Field*, 68 Ark. 534, 540.

89 *Bank of St. Albans v. Farmers' & Mech. Bank*, 10 Vt. 141.

tween the perpetration and discovery of a forgery will not deprive any party of redress.⁹⁰ Formerly, the law required notice of the discovery to be reported with great promptitude,⁹¹ by the modern law reasonable diligence is required both of individuals⁹² and of governments.⁹³ Unless the bank can show some injury arising from the delay in the notification, the claimant is not estopped from proceeding against the institution.⁹⁴

90 Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475, 481; Third Nat. Bank v. Allen, 59 Mo. 310. A delay of two months in the discovery is not too long. Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287; First Nat. Bank v. First Nat. Bank, 151 Mass. 282. See First Nat. Bank v. State Bank, 22 Neb. 769.

91 Cocks v. Masterman, 1 B. & C. (Eng.) 902; Smith v. Mercer, 6 Taunt. (Eng.) 76; Gloucester Bank v. Salem Bank, 17 Mass. 33; Bank of St. Albans v. Farmers' & Mech. Bank, 10 Vt. 141; Van Wert Nat. Bank v. First Nat. Bank, 6 Ohio C. C. 130; United States v. Central Nat. Bank, 6 Fed. 134; United States v. Clinton Nat. Bank, 28 Fed. 357.

92 Schroeder v. Harvey, 75 Ill. 638; Third Nat. Bank v. Allen, 59 Mo. 310; Koontz v. Central Nat. Bank, 51 Mo. 275; Goddard v. Merchants' Bank, 4 N. Y. 147; Corn Ex. Bank v. Nassau Bank, 91 N. Y. 74; White v. Continental Nat. Bank, 64 N. Y. 316; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475; National Bank v. Grocers' Bank, 2 Daly (N. Y.) 289; Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628; Star Fire Ins. Co. v. N. H. Nat. Bank, 60 N. H. 442; Brixen v. Deseret Nat. Bank, 5 Utah 504; Second Nat. Bank v. Guarantee Trust Co., 206 Pa. 616; Atlanta Nat. Bank v. Burke, 81 Ga. 597; United States v. National Bank of the Republic, 2 Mackey (D. C.) 289; Cooke v. United States, 91 U. S. 389, 402. A drawee bank is not negligent in failing for nearly a year to discover that the drawer's name was forged when the check was presented for payment through another bank that had discounted it with an apparently genuine endorsement by the payer. German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa 530. A delay of a month in giving notice after the discovery of a forgery releases the bank. United States v. National Ex. Bank, 45 Fed. 163. An executor sent a draft for a legacy payable to the order of the legatee. The name of the true legatee was forged, the draft was paid on the forged endorsement, but the executor did not notify the bank until four years after the discovery of the forgery. His negligence in not notifying the bank prevented a recovery. States v. First Nat. Bank, 203 Pa. 69.

93 United States v. Central Nat. Bank, 6 Fed. 134.

94 Murphy v. Metropolitan Nat. Bank, 191 Mass. 159; Janin v. London & San Francisco Bank, 92 Cal. 14; Hardy v. Chesapeake Bank, 51 Md. 562. See also Shepard & Morse Lumber Co. v. Eldridge, 171 Mass.

(b.) A bank that takes a check containing a forged endorsement and credits the presentor with the amount, and afterward refunds the money to the drawee bank is not obliged to notify the presentor of the forgery, but may charge the same to his account; for it is his duty to know that the check is genuine.⁹⁵

(c.) Finally, if an evil-minded wife forges checks on her husband's bank account that are paid, and, after learning of her conduct, he does not complain to the bank, it is not liable to him for her repetition of the deed.⁹⁶

25. Statutory Rule.

In Pennsylvania since 1849, whenever any draft, check, note or other negotiable instrument is erroneously paid the holder, and the signature of any person represented to be an acceptor or endorsee has been forged thereon, the endorsee or payor may recover back the amount from the person previously holding or negotiating the same. So from that date the drawee has recovered the money paid to the presentor. Nor does the bank's right to recover the money from the one to whom it was paid depend on his right or ability to recover from the forger.⁹⁷

26. Care Holder Must Take of Checks to Prevent Loss or Forgery.

"The holder of an unendorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his endorsement, so long as he

516; *National Bank v. Bangs*, 106 Mass. 441; *Danvers Bank v. Salem Bank*, 151 Mass. 280; *Kearny v. Metropolitan Trust Co.*, 110 N. Y. App. Div. 236.

95 *Green v. Purcell Nat. Bank*, 1 Indian Terr. 270.

96 *Neal v. First Nat. Bank*, 60 N. E. (Ind. App.) 164.

97 P. & L. Dig. 348, Sec. 10, Pam. Laws, 1849, 424, Sec. 10; *Tradesmen's Bank v. Third Nat. Bank*, 66 Pa. 435; *Chambers v. Union Nat. Bank*, 78 Pa. 205; *Corn Ex. Nat. Bank v. National Bank*, 78 Pa. 223; *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. 46. See *Bolles on Neg. and Non-Neg. Inst. of Pa.*, Chap. XXX, §§1, 2.

acts honestly, without collusion. Such a holder is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk, who, due care would have told him, was dishonest, and thus giving the clerk opportunity to commit crime. He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so; and he is under no legal obligations, either to the drawer of the check or to the public, to see to it that the check is not put in circulation with a forged endorsement.”⁹⁸

98 Barker, J., *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 528, citing *Combs v. Scott*, 12 Allen (Mass.) 493, 497; *Belknap v. National Bank*, 100 Mass. 376; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393, 395; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196; *Mount Morris Bank v. Gorham*, 169 Mass. 519, 521; *Patent Safety Gun Cotton Co. v. Wilson*, 49 Law J. Q. B. (N. S. Eng.) 713; *Societe Generale v. Metropolitan Bank*, 27 Law T. (N. S. Eng.) 849, 858; *Scholfield v. Londesborough* (1896) App. Cas. (Eng.) 514; *Bank of Ireland v. Evans' Charities*, 5 H. of L. Cas. (Eng.) 389; *Ogden v. Benas*, L. R. 9 C. P. (Eng.) 513; *Fine Art Society v. Union Bank*, 17 Q. B. Div. (Eng.) 705; *Swan v. Australasian Co.*, 2 Hurl. & C. (Eng.) 175, 189; *Arnold v. Cheque Bank*, 1 C. P. Div. (Eng.) 578, 586, 588. “A holder of a negotiable check is under no other legal obligations with reference to it than those which rest upon any holder of commercial paper completed and put in circulation by the maker. If the check is stolen from him and put in circulation by means of the forgery of his endorsement, he is not answerable as is one who entrusts to another his signature or endorsement in blank with authority to use it in making or giving currency to negotiable paper.” *Barker, J., Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 529. A bank is not liable to an employer for money paid on checks raised by an employe whose duty it was to make out such checks. *Champion Ice Co. v. American Bonding & Trust Co.*, 75 S. W. (Ky.) 197. A person who is without knowledge of the misappropriation of money by a cashier or teller in the way of drafts wrongfully issued by him is not responsible to the bank for the money thus misappropriated. *First Nat. Bank v. Brynes*, 61 Kan. 459.

CHAPTER XXV.

LIEN AND SET OFF.*

<ol style="list-style-type: none">1. Extent of lien usage.2. When the bank must make the application.3. The indebtedness must be mutual.4. Debt must be due.5. What deposits or securities can be thus applied.<ol style="list-style-type: none">a. A special deposit cannot be.b. A deposit not belonging to the debtor cannot be, unless unknown by the bank.c. Courts generally charge banks with knowledge of true ownership.d. Banks can only apply an-	<p>other's deposit in cases of ignorance.</p> <ol style="list-style-type: none">e. Illustration.f. A bank is liable for wrongful diversion.6. Depositor signing as agent, assignee, etc., does not identify deposit.7. Application of deposit and collateral in cases of debt thus secured.8. Insolvency of depositor does not affect bank's lien.9. Lien against non-depositor.10. Lien on bank correspondent.
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1. Extent of Lien Usage.

At the maturity of a depositor's indebtedness any deposit he may have, not exceeding his liability, and other securities that may be in the bank's possession in the regular course of business which have not been applied by the depositor himself, may be applied by the bank to extinguish his indebtedness.¹

¹ Commercial Bank v. Hughes, 17 Wend. (N. Y.) 94; Marsh v. Oneida Cent. Bank, 34 Barb. (N. Y.) 298; Falkland v. St. Nicholas Nat. Bank, 84 N. Y. 145; Delahunty v. Central Nat. Bank, 63 N. Y. App. 177, 179; Greene v. Jackson Bank, 18 R. I. 779; Gibbons v. Hecox, 105 Mich. 509; Garrison v. Union Trust Co., 139 Mich. 392; Ford v. Thornton, 3 Leigh (Va.) 695; Ellis v. First Nat. Bank, 22 R. I. 565; Coates v. Preston, 105 Ill. 470; Home Nat. Bank v. Newton, 8 Ill. App. 563; Hayden v. Alton Nat. Bank, 29 Ill. App. 458; Merchants' Nat. Bank v. Maple, 65 Ill. App. 484; Bank v. Brewing Co., 50 Ohio St. 151; Dawson v. Real Estate Bank, 5 Ark. 283; Cockrill v. Joyce, 62 Ark. 216; McDowell v. Bank, 1 Harr.

*See Chapter XXXI, on presentation and adjustment of claims in connection with this chapter.

Nor is the lien thus attaching to the money and other securities in the bank's possession belonging to the depositor impaired by unknown equities.²

In some states, doubtless a small number, a tighter rule is held on the bank's right of application; it must notify the depositor of its action. And if it does not, and he draws checks against his supposed deposit, which are dishonored, he may claim damages against the bank for its action.³ In other states a bank lien is not recognized, save by agreement or by a particular course of dealing.⁴

The right of a bank to set off its stock against the indebtedness of its owners has been considered in another chapter.⁵

2. When the Bank Must Make the Application.

To perfect its lien a bank need not make a formal application

(Del.) 369; Knapp v. Cowell, 77 Iowa 528; Union Bank v. Tutt, 5 Mo. App. 342; Muench v. Valley Nat. Bank, 11 Mo. App. 144; Mt. Sterling Nat. Bank v. Green, 99 Ky. 262; Herndon v. Louisville Bkg. Co., 10 Ky. L. Rep. 584; Citizens' Bank v. Bowen, 21 Kan. 354; Buffalo Co. Bank v. Hanson, 34 Neb. 455; Eyrich v. Capital State Bank, 67 Miss. 60; Slack v. Northwestern Nat. Bank 103 Wis. 57, 65; Lehman v. Tallassee Mfg. Co., 64 Ala. 567, 595; Hodgin v. People's Nat. Bank, 124 N. C. 540; State Bank v. Armstrong, 4 Dev. Law (N. C.) 519; Clark v. Northampton Bank, 160 Mass. 26; National Mahwahie Bank v. Peck, 127 Mass. 298; Rice v. Third Nat. Bank, 97 Mich. 414; Lamb v. Morris, 118 Ind. 179; Second Nat. Bank v. Hill, 76 Ind. 223; Commercial Nat. Bank v. Henninger, 105 Pa. 496; Liggett Spring & Axle Co.'s Appeal, 111 Pa. 291; Miller v. Farmers' & Mech. Bank, 30 Md. 392; Bank v. New England Bank, 1 How. (U. S.) 234; Reynes v. Dumont, 130 U. S. 354; In re Farnsworth, 5 Biss. 223; Kelly v. Phelan, 5 Dill. (U. S.) 228; Blair v. Allen, 3 Dill. (U. S.) 101; Davis v. Bowsher, 5 Term (Eng.) 488; Ex parte Wakefield Bank, 1 Rose (Eng.) 243; Rogerson v. Ladbroke, 1 Bing. (Eng.) 93. A discount by a bank cannot be immediately appropriated by the discounter to extinguish past indebtedness. Parry v. Highley, 8 Pa. Co. Ct. 584. See full note, 111 Am. St. Rep. 419.

² National Bank v. Insurance Co., 104 U. S. 54.

³ Callahan v. Bank of Anderson, 48 S. E. (S. C.) 293.

⁴ Morgan v. Lathrop, 12 La. Ann. 257; Hancock v. Citizens' Bank, 32 La. Ann. 590. If there be a usage, whereby persons engaged in discounting paper have a lien for a general balance against their customer, it must be proved, for it will not be presumed. The lien of a banker does not include other persons. Grant v. Taylor, 3 J. & Sp. (35 N. Y. Superior) 338.

⁵ Chap. IV. §23.

of a deposit to the owner's indebtedness.⁶ Its refusal to honor his check, because of his indebtedness to the bank, is an application of his deposit. A bank therefore can appropriate a deposit to pay a matured obligation as against his attaching creditor, although it had not been exercised at the time of making the attachment.⁷ In Illinois, however, the opposite and less general rule is maintained.⁸ And if a depositor fails owing his bank a matured obligation his deposit becomes a security for and payment pro tanto of his liability.⁹ Even in Illinois, after a deposit has been applied, it may be retained against the subsequent presentor of a check, though given to him before the bank made its application.¹⁰

Again, when different applications of a deposit are attempted the same day, does the prior application in fact prevail? In most cases, unless some good reason is shown, a different rule should be applied.¹¹

3. The Indebtedness Must be Mutual.

The indebtedness must be mutual.¹² But the rule of strict mutuality is not always an absolute essential in allowing a set off. "Courts of equity," says the highest federal tribunal, "frequently deviate from the strict rule of mutuality when the justice of the particular case requires it; and the ordinary rule

6 Mt. Sterling Nat. Bank v. Green, 99 Ky. 262.

7 People v. St. Nicholas Bank, 44 N. Y. App. Div. 313. In Meyers v. New York Co. Nat. Bank, 36 N. Y. App. Div. 482, 484, the court said: "When a depositor opens an account in a bank that very act, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect."

8 Niblack v. Park Nat. Bank, 169 Ill. 517.

9 Demmon v. Boylston, 5 Cush. (Mass.) 194; Rose v. Hart, 8 Taunt, (Eng.) 499. See cases ante note 1.

10 Meyers v. Union Nat. Bank, 27 Ill. App. 254; Fort Dearborn Nat. Bank v. Blumenzweig, 46 Ill. App. 297.

11 See Fisher v. Hanover Nat. Bank, 26 U. S. App. 386.

12 Aurora Nat. Bank v. Dils, 18 Ind. App. 319; Second Nat. Bank v. Hill, 76 Ind. 223. Money deposited by several persons for a special purpose, which is to be paid out on their joint checks, cannot be applied by the bank to the indebtedness of one of the depositors. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. Rep. 561.

is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies set off of the debt due upon the other."¹³ This rule was applied on the occasion of a creditor who attached a depositor without knowing of his assignment and afterward agreed with the bank to borrow and check thereon, both supposing that ultimately the attachment would be perfected. Subsequently the bank assigned. Yet the attaching creditor was permitted in equity to set off the deposit against the amount received from the bank.¹⁴ The rule may also be applied to the deposit of a town, which may be set off against warrants it has issued belonging to the bank.¹⁵

On the other hand, money or securities in a bank's possession jointly or severally owned by a depositor and others cannot be applied to the payment of his individual obligation,¹⁶ nor can a bank set off in the way of unliquidated damages against its cashier, for his mismanagement, his deposit after it has been attached by one of his creditors.¹⁷ But any note or other obligation which a bank promises to pay for its depositor on his promise to transfer his balance in repayment is in equity transferred, though the bank may not have completed the transfer before its failure, or the failure of the depositor.¹⁸

4. Debt Must be Due.

An indispensable condition of such application is the maturity of the depositor's obligation.¹⁹ Even his impending in-

¹³ Scott v. Armstrong, 146 U. S. 499, 507; Tate v. Evans, 54 Ala. 16. See cases in §1, note 1.

¹⁴ Renfro v. Yarbrough, 39 So. (Ala.) 660.

¹⁵ Town of Manitou v. First Nat. Bank, 86 Pac. (Colo.) 75.

¹⁶ Dawson v. Real Estate Bank, 5 Ark. 283. See Long Island Bank v. Townsend, Hill & Denio (N. Y.) 204.

¹⁷ Ben Roy Irvine v. Dean, 93 Tenn. 346.

¹⁸ Chase v. Petroleum Bank, 66 Pa. 169; Coats v. Donnell, 94 N. Y. 168.

¹⁹ Chap. XXXI. §§20-23. Commercial Nat. Bank v. Proctor, 98 Ill. 558; Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398; Merchants' Nat. Bank v. Robinson, 97 Ky. 552; Zelle v. German Sav. Institution, 4 Mo. App. 401; Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803, and

solvency will not justify a bank in making any application before his indebtedness is due.²⁰ This is the rule "at strict law"; in equity, so a court has recently declared, "it seems that where there is danger of insolvency the bank would be allowed to retain enough of the deposit to meet the note when due, though, it is said, in law the debt in futuro could not be set off against a debt in præsentii."²¹ But this view, though sometimes countenanced in the reasonings of the courts, has been rarely applied. But the general rule under consideration does not apply to a deposit retained to pay a discounted note on a fraudulent representation.²²

5. What Deposits or Securities Can be Thus Applied.

The larger number of questions arising under this head are, What funds can be thus applied? Banks naturally seek to lessen or avert loss, and to that end often attempt to hold deposits to which they have no right. Let us then seek to ascertain the limitations on their authority.

(a.) A deposit by particular agreement cannot be diverted

cases cited; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467; *Martin v. Kunzmuller*, 37 N. Y. 396; *Myers v. Davis*, 22 N. Y. 489; *Beckwith v. Union Bank*, 9 N. Y. 211, affg. 4 Sand. 604; *Bradley v. Angel*, 3 N. Y. 475; *Van Allen v. American Nat. Bank*, 3 Lans. (N. Y.) 517, affd. 52 N. Y. 1; *Manufacturers' Nat. Bank v. Jones*, 2 Penny. (Pa.) 377; *Skunk v. Merchants' Nat. Bank*, 16 Week. L. Bull. (Ohio) 353; *Oatman v. Batavian Bank*, 77 Wis. 501. See *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16. A demand note is due at once and may without actual demand be treated as a matured debt to which a set-off may be applied. *Citizens' Sav. Bank v. Vaughan*, 115 Mich. 156. When notes have matured a bank has a superior lien on the maker's deposit to that of a judgment creditor entered at a later date. *Delahunty v. Central Nat. Bank*, 63 N. Y. App. Div. 177. A bank cannot hold a deposit to apply on a debt not due as against a garnishee. *Fler v. Midland Nat. Bank*, 69 Mo. App. 64; *Reppy v. Reppy*, 46 Mo. 571; *Kortjohn v. Continental Nat. Bank*, 63 Mo. App. 166. But if the plaintiff's debt is not due, he cannot sustain his action and hold the deposit. *Ibid.*

²⁰ *Ibid.*

²¹ *Gibbons v. Hecox*, 105 Mich. 509, 512.

Contra.—*Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495; *Spaulding v. Backus*, 122 Mass. 553; *In re Commercial Bank*, L. R. 1 Ch. (Eng.) 538.

²² *Andrews v. Artisans' Bank*, 26 N. Y. 298.

by the bank for any purpose. A fire insurance policy, for example, confided to a bank cannot be diverted for a debt due from the owner.²³ Such a deposit is special and the terms of the agreement must be strictly regarded.²⁴ In attempting to divert such a deposit banks more than once have failed.²⁵ Of course, to hold a bank for a misapplication the charge must be clearly proved.²⁶

(b.) In like manner a deposit not belonging to a depositor, as the bank knows, cannot be applied to the payment of his personal debt.²⁷ For example, a public deposit made by an official,²⁸ or a deposit made by him of individual money to balance his public account;²⁹ or a deposit by an executor,³⁰ or other trustee³¹ to the credit of an estate; or a deposit by an agent belonging to his principal.³² Likewise, the deposit of an

²³ First Nat. Bank v. Cleland, 36 Tex. Civ. App. 478.

²⁴ Dawson v. Real Estate Bank, 5 Ark. 283; National Bank v. Speight, 47 N. Y. 668; Faulkner v. Cumberland Valley Bank, 14 Ky. L. Rep. 923; First Nat. Bank v. Germania Trust Co., 112 Ky. 734.

²⁵ Wilson v. Dawson, 52 Ind. 513; Armour-Cudahy Packg. Co. v. First Nat. Bank, 69 Miss. 700; Murdock v. Citizens' Bank, 23 La. Ann. 113; Judy v. Farmers & Traders' Bank, 81 Mo. 404; Straus v. Tradesmen's Nat. Bank, 122 N. Y. 379; Bank v. Macalester, 9 Pa. 475.

²⁶ Boettcher v. Colorado Nat. Bank, 15 Colo. 16. The owner of bank stock left it with the cashier of a bank to obtain a loan thereon, who was advised to remit the proceeds to the owner. The cashier had no right to appropriate these to the borrower's indebtedness to the bank. Winslow v. Harriman Iron Co., 42 S. W. (Tenn. Ch. App.) 698. But when a deposit is made for a particular enterprise, which is finally abandoned, the bank may appropriate the deposit to pay a debt due from the depositor. Bank of Commerce v. Franklin, 90 Ill. App. 91.

²⁷ See Chap. XVI. §16.

²⁸ McDowell v. Bank, 2 Del. Ch. 1, revsd. 1 Harr. 369; Hurd v. Farmers' Loan & Trust Co., 63 How. Pr. (N. Y.) 314.

²⁹ United States v. National Bank, 73 Fed. 379.

³⁰ Tobey v. Manufacturers' Nat. Bank, 9 R. I. 236.

³¹ Bundy v. Town of Monticello, 84 Ind. 119; Bank v. Clapp, 76 N. C. 482; First Nat. Bank v. Peisert, 2 Penny. (Pa.) 277. See Sayre v. Weil, 94 Ala. 466.

³² National Bank v. Insurance Co., 104 U. S. 54; Burtnett v. First Nat. Bank, 38 Mich. 630; Union Nat. Bank v. Goetz, 138 Ill. 127; Farmers' & Mech. Bank v. King, 57 Pa. 202; Union Stock-Yards Nat. Bank v. Gillespie, 137 U. S. 411; Johnson v. Payne & Williams Bank, 56 Mo. App. 257;

individual partner cannot be applied to the partnership debt,³³ notwithstanding the universal rule that each partner is severally responsible for the indebtedness of the concern;³⁴ nor the deposit of a partnership to an individual debt,³⁵ nor the deposit of a new partnership to the debt of an old partnership,³⁶ but a bank may set off an indebtedness against a banking firm which in the beginning was conducted by an individual who afterward formed a secret partnership with others.³⁷

Again, a deposit kept in another's name cannot be applied to the debt of the true owner,³⁸ nor a trust deposit to the personal indebtedness of the same individual depositor.³⁹ Lastly,

Baker v. New York Nat. Ex. Bank, 100 N. Y. 31; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756; *Davis v. Panhandle Nat. Bank*, 29 S. W. (Tex. Civ. App.) 926; *Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75; *Peak v. Ellicott*, 30 Kan. 156; *Whitley v. Foy*, 6 Jones Eq. (N. C.) 34; *Knatchbull v. Hallet*, 13 Ch. Div. (Eng.) 696.

33 *Mecutchen v. Kennedy*, 27 N. J. Law 230, 236; *Gallagher's Appeal*, 114 Pa. 353; *Chanute Nat. Bank v. Crowell*, 6 Kan. App. 533; *Sefton v. Hargett*, 113 Ind. 592; *Harrison v. Harrison*, 118 Ind. 179; *International Bank v. Jones*, 119 Ill. 407; *Coates v. Preston*, 105 Ill. 470; *Raymond v. Palmer*, 41 La. Ann. 425; *Hodgin v. People's Nat. Bank*, 124 N. C. 540; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; *O'Grady v. Stotts City Bank*, 80 S. W. (Tex.) 696; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Watts v. Christie*, 11 Beav. (Eng.) 546; *Addis v. Knight*, 2 Mer. (Eng.) 117. See Chap. XXXI. §26.

Contra.—*Eyrich v. Capital State Bank*, 67 Miss. 60; *Owsley v. Bank of Cumberland*, 66 S. W. (Ky.) 33.

34 *Adams v. First Nat. Bank*, 113 N. C. 332; *International Bank v. Jones*, 119 Ill. 407; *Raymond v. Palmer*, 41 La. Ann. 425; *Dawson v. Real Estate Bank*, 5 Ark. 283.

35 *Coote v. Bank*, 3 Cranch. C. C. (U. S.) 50; *West v. Kendrick*, 46 Ga. 526.

36 *International Bank v. Jones*, 119 Ill. 407. But in North Carolina, contrary to the better rule, it is held that in the absence of opposing evidence, the presumption is that a deposit account continued by the surviving partner under the old name is in behalf of the old partnership and the deposit may be applied on its debts. *Hodgin v. People's Nat. Bank*, 124 N. C. 540.

37 *Willey v. Crocker-Woolworth Nat. Bank*, 141 Cal. 508.

38 *Douglas v. First Nat. Bank*, 17 Minn. 35.

39 *Jeffray v. Towar*, 63 N. J. Eq. 530. See Chap. XVI. §16. A kept a deposit account with a bank in the name of B. The bank, supposing the account belonged to the latter, charged up to him a note that was unpaid

money that is exempt by statute from attachment, pensions and the like, cannot thus be applied.⁴⁰

(c.) Again, courts do not hesitate to declare that a bank by virtue of its relations with its customers knows, or ought to know, whether the deposits that often come into its possession really belong to the depositor or not. Many of the old subterfuges by which banks sought to prove ignorance no longer avail. The law is raising presumptions against them, and the courts are scanning the evidence more keenly than formerly to find evidence of the bank's knowledge. The strong tendency is, in all cases in which the deposit did not in truth belong to the depositor, to declare that the bank ought to have known the fact and was negligent if it did not, and ought to suffer rather than the true owner. There is no reason in most of these cases in holding that as between an innocent owner who has been defrauded by his agent or trustee and the bank which stands in a better situation to know of his rascalities, that he should suffer and the bank be the gainer. Justice requires the reversal of the rule.

(d.) The rule has been declared that a deposit applied by a bank at its depositor's request to his debt without any knowledge of adverse ownership can be retained.⁴¹ The rule rests

before the opening of the account. It was held that the bank could not do this without A's consent. *Douglas v. First Nat. Bank*, 17 Minn. 35. The special circumstances at the opening of two accounts may justify the right to set off the two accounts. Thus in *Boody v. Pratt*, 64 N. J. Law 281, a depositor having funds of his own in his own account with a broker, transferred a portion of the balance due him to an account in the name of his wife, proposing to continue transactions with the broker on both accounts. At the time of the transfer the depositors stipulated that, notwithstanding the transfer, the new account should, to the extent of the amount transferred from the depositor's own account, make good that account. This agreement authorized the set-off. See *Jeffray v. Towar*, 63 N. J. Eq. 530, 544, for comment thereon.

⁴⁰ *Moore v. Marsh*, 16 Pa. Week. Notes 239; *Blood v. Taylor*, 2 Chester Co., (Pa.) 493; *Folschow v. Werner*, 51 Wis. 85; *Eckert v. McKee*, 9 Bush (Ky.) 355; *Burgett v. Fancher*, 35 Hun (N. Y.) 647; *Stockwell v. National Bank*, 36 Hun (N. Y.) 583.

⁴¹ *McEwen v. Davis*, 39 Ind. 109; *Allen v. Brown*, 39 Iowa 330. (See *Laubach v. Leibert*, 87 Pa. 55.) *Wood v. Boylston Nat. Bank*, 129 Mass. 358; *Kimmel v. Bean*, 75 Pac. (Kan.) 1118, citing many cases.

on an ancient foundation that money has no earmarks and therefore when honestly taken can be kept. Modern jurisprudence is assailing this rule. The truth is recognized that money has no more sacredness than other kinds of property, and that the true owner ought under many conditions to recover his own, especially when the receiver would not be in a worse state than he would have been had it not been paid to him.

(e.) Thus an individual lent money to a borrower who gave his note therefor as principal and another as surety. By mistake, the money was deposited in a bank to the surety's credit and applied by the institution to his overdue note. Nevertheless, the principal recovered the amount.⁴² In another case A gave B two checks to take up two notes on which both were liable. B deposited them and used a part of the amount to pay an overdraft. Afterward he assigned and A notified the bank of his ownership of the checks. It paid the remainder of the deposit to B's assignee. Nevertheless, the bank was liable to A for the entire amount.⁴³ Another case may be mentioned in which the proceeds of a transaction which belonged to several persons were transmitted in the name of A to a bank and in part applied to extinguish his debt to the institution. The bank was liable for the amount thus converted, regardless of the question of its knowledge of the ownership of the fund.⁴⁴

(f.) Lastly, a bank that wrongfully diverts a deposit for its own benefit may be liable in damages, which may be more than nominal.⁴⁵

6. Depositor Signing as Agent, Assignee, Etc., Does Not Identify Deposit.

The rule has been declared that as the word "assignee," "agent" and the like appended to a depositor's name does not identify his account as belonging to any particular person or

42 Armstrong v. National Bank, 53 Iowa 752.

43 Anderson v. Market Nat. Bank, 1 N. Y. Supp. 136.

44 Davis v. Panhandle Nat. Bank, 29 S. W. (Tex. Civ. App.) 926.

45 O'Grady v. Stotts City Bank, 106 Mo. App. 366.

fund, his deposit may be regarded as his own and may be applied to his indebtedness.⁴⁶ The soundness of this rule may be questioned, for such words clearly imply that the deposit does not belong to the depositor,⁴⁷ consequently a bank is not justified in applying it to his debt.⁴⁸

7. Application of Deposit and Collateral in Cases of Debt Thus Secured.

To a bank possessing collaterals as security for a debt a different rule applies. It has a lien on the debtor's deposit only for the balance that may be due beyond the value of the security.⁴⁹ Nor can the bank prove by parol evidence that the collaterals were to be held for other debts.⁵⁰

On the other hand, the surplus of collateral pledged for a particular purpose or debt cannot be applied by the bank on other indebtedness of the depositor.⁵¹

46 Laubach v. Leibert, 87 Pa. 55; Comfort v. Patterson, 2 Lea (Tenn.) 670. See Chaps. XVI. §§16-18; XX. §6a.

47 Citizens' Nat. Bank v. Alexander, 120 Pa. 476.

48 National Bank v. Insurance Co., 104 U. S. 54; Cook v. Tullis, 18 Wall. (U. S.) 332; Burnett v. First Nat. Bank, 38 Mich. 630; Neely v. Rood, 54 Mich. 134; Knatchbull v. Hallett, L. R. 13 Ch. Div. (Eng.) 696.

49 Memphis City Bank v. Smith, 110 Tenn. 335; Neponset Bank v. Leland, 5 Met. (Mass.) 259; Gillet v. Bank of America, 160 N. Y. 549; Duncan v. Brennan, 83 N. Y. 487; Wyckoff v. Anthony, 90 N. Y. 442; Masonic Sav. Bank v. Bangs, 84 Ky. 135, and cases cited; Farmers' Nat. Bank v. McFerran, 11 Ky. L. Rep. 183; Reynes v. Dumont, 130 U. S. 354 and cases cited. See Chap. VII. §§26, 27. A customer pledged property as collateral security for the payment of a note "or any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing." Such a pledge means the customer's liabilities in the ordinary course of banking business and does not include a note payable to a third person which is not paid by the bank. Gillet v. Bank, 160 N. Y. 549.

50 Hyde v. German Nat. Bank, 115 Wis. 170.

51 Neponset Bank v. Leland, 5 Met. (Mass.) 259; Hathaway v. Fall River Nat. Bank, 131 Mass. 14; Brown v. New Bedford Sav. Institution, 137 Mass. 262; Masonic Sav. Bank v. Bangs, 84 Ky. 135; Wyckoff v. Anthony, 90 N. Y. 442; Duncan v. Brennan, 83 N. Y. 487; Davis v. Bowsher, 5 Term (Eng.) 488; Vanderzee v. Willis, 3 Bro. Ch. Cas. (Eng.) 20; Lane v. Bailey, 47 Barb. (N. Y.) 395; Robinson v. Frost, 14 Barb. 536. When a note held by a bank is wrongfully used by it as collateral, the in-

8. Insolvency of Depositor Does Not Affect Bank's Lien.

The insolvency of a depositor does not affect a bank's lien; on the other hand, his assignee can make any defence that his depositor had against the bank.⁵² And in the states where the assignment rule prevails a bank cannot set off its unmatured note against the deposits of an insolvent depositor and thereby cut out the holder of a check given previous to the depositor's assignment. As the check operated to assign, to the amount thereof, the maker's deposit, the bank cannot appropriate what has been already appropriated.⁵³

9. Lien Against Non-Depositor.

In those states wherein a check operates to assign the maker's deposit to the assignee, it has this effect, though given before, but not presented until after the bank's failure.⁵⁴ This effect, however, is limited to the states wherein the assignment rule prevails and also to their banks; it applies nowhere to national banking associations.⁵⁵

10. Lien on Bank Correspondent.

The liens of bank correspondents have been already con-nocent pledgee usually can retain it until his claim is satisfied. But when the maker, endorsee or other party liable thereon satisfies this, he can use the note as a set-off, or in other ways quite the same as though the bank had never made a wrongful use of it. *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381. See *Anderson v. Market Nat. Bank*, 1 N. Y. Supp. 136.

⁵² *Joyce v. Auten*, 179 U. S. 591; *Bank v. New England Bank*, 1 How. (U. S.) 234, 239; *Reynes v. Dumont*, 130 U. S. 354, 391, 392. A bank is entitled to the proceeds of a collateral note as against the assignee of the owner who is indebted to the bank, even though the collection is completed after his failure. *Greene v. Jackson Bank*, 18 R. I. 779. A bank may pay a note or check after the maker's assignment, and the payment is a good set-off to an action by the assignee for the assignor's deposit. *Griffin v. Rice*, 1 Hilton, 184. A director of an insolvent bank who receives a negotiable note due from a third person to the bank in payment of a debt due from the bank to himself may be liable to the bank or to the stockholders for so doing; the maker cannot urge this as a defence for not paying it. *Bruce v. Hawley*, 31 Vt. 643.

⁵³ *MERCHANTS' NAT. BANK V. ROBINSON*, 97 Ky. 552.

⁵⁴ *METROPOLITAN NAT. BANK V. JONES*, 137 Ill. 634.

⁵⁵ *FIRST NAT. BANK V. SELDEN*, 56 C. C. A. 532; *Laclede Bank v. Schuler*, 120 U. S. 511; *Fourth Street Bank v. Yardley*, 165 U. S. 634.

sidered in describing their other rights and duties. It may be added that a bank may apply a deposit belonging to a correspondent bank to the payment of a certificate of deposit held against it, although it has given a check for a portion which has not been presented, or of which the applying bank has no knowledge.⁵⁶

56 Wyman v. Ft. Dearborn Nat. Bank, 181 Ill. 279, revg. 80 Ill. App. 150. The holder of such a check, however, has a right to be subrogated to the security the bank had in its possession belonging to the correspondent after discharging in full its own debt. *Ibid.*

CHAPTER XXVI.

PAYMENT OF DEPOSITOR'S NOTES.

<ol style="list-style-type: none">1. Duty of bank to pay note made payable there.<ol style="list-style-type: none">a. Nature of agency.b. Duty of bank in paying.c. Bank cannot retain deposit in advance for this purpose.d. Holder's mode of presentation.e. Bank's duty does not extend to other matters.2. Bank cannot interfere with depositor's right to apply his money.3. Bank is not required to apply a present insufficient deposit.4. Bank is not required at maker's request to apply subsequent insufficient deposit.5. Application of deposit by bank by mistake.6. Bank's duty when note is endorsed.<ol style="list-style-type: none">a. Different rules.b. Presentment after maturity.	<ol style="list-style-type: none">c. Payment when deposit is insufficient.7. Application of insolvent depositor.8. Presentment of note after maturity.9. Application of deposit of endorser.10. Liability of party on collateral is not affected by non-application of borrower's deposit.11. Time during day for presentation.12. Mode of presentation. Recovery.13. Different rule to bank as owner or agent.14. Bank is not maker's agent of note without possession.15. When bank is payor's agent.16. At what time must money be applied.17. Bank's failure after maturity of paper.18. Who must lose by paying paper in illegal notes.
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1. Duty of Bank to Pay Note Made Payable There.

(a.) The notes of a depositor not belonging to his bank fall into two classes, notes made payable there and others payable elsewhere. Both kinds are often sent to his home bank for collection. By depositing a negotiable note at the bank where it is made payable it becomes the holder's agent with authority to receive the money in payment at maturity, or afterward.¹

¹ Dillingham v. Parks, 30 Ind. App. 61, 69; Ward v. Smith, 7 Wall. (U. S.) 447; Caldwell v. Evans, 5 Bush (Ky.) 380; Lazier v. Horan, 55

The agency is not created simply by making a note payable at a particular bank; it must be left there for collection.² By paying the debt to a bank acting as agent of the creditor, the debtor is discharged.³

(b.) Notes and other obligations falling within the first class are in most states equivalent to an order to pay them to their owners. In effect, the bank's duty to pay them, so long as the depositor has sufficient funds, is just as imperative as its duty to pay his check.⁴ But in at least three states this

Iowa 75, 80; Garland v. Salem Bank, 9 Mass. 408, 414; Alley v. Rogers, 19 Gratt. (Va.) 366, 383; Bank v. Kenan, 76 N. C. 340. See Bolles on Bank Coll. §§151, 152.

² Dillingham v. Parks, 30 Ind. App. 61, 69; Hills v. Place, 48 N. Y. 520; Caldwell v. Evans, 5 Bush (Ky.) 380; Adams v. Hackensack Imp. Commission, 44 N. J. Law 638. See §14.

³ Griffin v. Erskine, 109 N. W. (Iowa) 13.

⁴ Pa. Neg. Instruments Law, §87. The same law in other States contains a similar provision. Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 88; Indig v. National City Bank, 80 N. Y. 100, 106; Union Bank v. Griffin, 4 N. Y. Leg. Obs. 344; Griffin v. Rice, 1 Hilton (N. Y.) 184; Central Bank v. Theim, 76 Hun (N. Y.) 571; Ford v. Thornton, 3 Leigh (Va.) 695; Commercial Nat. Bank v. Henninger, 105 Pa. 496, (see comment on this case in 176 Pa. 518); see Merchants & Planters' Bank v. Meyer, 56 Ark. 499, 509; Lehman v. Tallassee Mfg. Co., 64 Ala. 567; Bedford Bank v. Acoam, 125 Ind. 584; Dillingham v. Parks, 30 Ind. App. 61, 70; Frances v. People's Nat. Bank, 1 Ohio N. P. 281; Lazier v. Horan, 55 Iowa 75; State Bank v. McCabe, 135 Mich. 479; Citizens' Bank v. Carson, 32 Mo. 191; Park Bank v. Schneidermeyer, 62 Mo. App. 179; O'Grady v. Stotts City Bank, 106 Mo. App. 366; Mt. Sterling Nat. Bank v. Green, 99 Ky. 262; Second Nat. Bank v. Hill, 76 Ind. 223; Scott v. Shirk, 60 Ind. 160; Gray v. Farmers' Nat. Bank, 81 Md. 631; Farmers' & Merch. Bank v. Franklin Bank, 31 Md. 404, 412; Clarke v. Hawkins, 5 R. I. 219; Hodgin v. People's Nat. Bank, 125 N. C. 503; Mandeville v. Union Bank, 9 Cranch (U. S.) 9; Robarts v. Tucker, 16 Ad. & E. (Eng. N. S.) 560; Kymer v. Laurie, 18 L. J. Q. B. (Eng.) 218; Forster v. Clements, 2 Camp. (Eng.) 17; Whittaker v. Bank of England, 6 C. & P. (Eng.) 700; Rogerson v. Ladroke, 1 Bing. (Eng.) 93.

A note payable in installments is due on the failure to pay the first installment. Lightfoot v. Branch Bank, 2 Ala. 345. A note discounted for the payee and afterward charged to his account will not bar an action thereon by the payee against the maker. Bank v. Ralston, 3 Phila. 328. Although a bank have in its possession money, dividends of stock, or other property belonging to the maker of a note, equal to or greater than the

authority is positively withheld from a bank without still more specific direction.⁵

Such action constitutes payment and stops the running of the statute of limitations.⁶

(c.) The existence of this rule, however, does not confer on a bank the right to retain a deposit in advance for this purpose; nor is the liability of the maker of a note affected by a deposit made after its maturity.⁷ But an agreement may be made between bank and depositor before the maturity of his note that his deposit shall be applied in payment. And such an agreement may be shown in a proceeding by the sheriff to levy on the deposit.⁸

(d.) When a note is thus made payable the holder's duty is to make a presentation at the bank mentioned to receive his money. And "if the instrument be not there lodged," says Justice Field, "and the obligor is there at maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages."⁹ Sometimes the holder happens to be a pledgee, either with or without the maker's knowledge. And if the maker of such a note has deposited the payment money at the bank where his note is payable, which is not duly presented by the pledgee, and the money is subsequently lost through the failure of the depository, ought not the pledgee, rather than the maker of the note, to sustain the loss?¹⁰

amount due, he must pay. He can only claim to have the money or other funds in its possession deducted from the amount due. *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489.

5 *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350; *Wood & Co. v. Merchants' Sav. Co.*, 41 Ill. 267; *Ridgley Nat. Bank v. Patton*, 109 Ill. 479; *Gordon v. Muchler*, 34 La. Ann. 604; *Hancock v. Citizens' Bank*, 32 La. Ann. 590, and cases there cited; *Pierson v. Metropolitan Bank*, 30 So. (La.) 885; *Mt. Sterling Nat. Bank v. Green*, 99 Ky. 262, 264.

6 *Park Bank v. Schneidermeyer*, 62 Mo. App. 179.

7 *State Bank v. McCabe*, 135 Mich. 479.

8 *Schuler v. Citizens' Bank*, 13 S. Dak. 188.

9 See §12. *Ward v. Smith*, 7 Wall (U. S.) 447, 451; *Greeley v. Whitehead*, 35 Fla. 523.

10 *State Nat. Bank v. Hyatt*, 75 Ark. 170, in which the opposite view is maintained.

(e.) The obligation of a bank to pay a depositor's notes made payable there does not extend to other matters, save by specific agreement. Thus a bank in which the vendor of personal property has deposited the proceeds of a sale is under no obligation to apply the money to discharge liens held by others thereon.¹¹

2. Bank Cannot Interfere With Depositor's Right to Apply His Money.

In no state does a bank's right of application prevent its depositors from applying their deposits differently; and having done so and notified their bank, it cannot nullify their action and make a different application.¹² On the other hand, a depositor who directs his bank to apply future deposits on a note he has given to the institution, even though it may not be due at the time of depositing, is estopped from claiming that they are subject to his checks. This specific order given directly to the bank prevails over every other.¹³

3. Bank is Not Required to Apply a Present Insufficient Deposit.

Still less is the bank's obligation to apply a depositor's insufficient balance to the payment of his note.¹⁴ In some states a bank can safely do this,¹⁵ but is not required to make the ap-

¹¹ Cox v. Beck, 83 Fed. 269.

¹² First Nat. Bank v. Peltz, 167 Pa. 513; German Nat. Bank v. Foreman, 138 Pa. 174; First Nat. Bank v. Hall, 119 Ala. 64; Lamb v. Morris, 118 Ind. 179, 182; People's Bank v. Legrand, 103 Pa. 309; Egerton v. Fulton Nat. Bank, 43 How. Pr. (N. Y.) 216; Second Nat. Bank v. Hill, 76 Ind. 223. If the application is delayed until after the recovery of a judgment on the note, the deposit may still be applied. Marsh v. Oneida Central Bank, 34 Barb. (N. Y.) 298.

¹³ Roe v. Bank of Versailles, 167 Mo. 406; Harrison v. Harrison, 20 N. E. (Ind.) 746. The holder of a check presented it to the bank for payment which defended that the money had already been applied on notes owed by the maker to the bank. The holder was permitted to prove an agreement between the bank and the maker of the check that the money was not to be thus applied. Bloom v. Winthrop State Bank, 121 Iowa 101.

¹⁴ Bacon v. Bacon, 94 Va. 686, 693.

¹⁵ Jones v. Bank, 29 Upper Can., Q. B. 448; London & San Francisco Bank v. Parrott, 125 Cal. 472, 485.

plication;¹⁶ in other states a bank cannot apply a subsequent deposit under these conditions.¹⁷

4. Bank is Not Required at Maker's Request to Apply Subsequent Insufficient Deposit.

Nor is a bank required at the maker's or holder's request to apply a subsequent insufficient deposit to discharge the maker's liability; nor will its refusal discharge the endorser.¹⁸

5. Application of Deposit by Bank by Mistake.

A bank that pays a note made payable there, supposing the maker's deposit is sufficient, cannot recover the amount from the holder on the discovery of its mistake. This principle, notwithstanding its severity, is amply supported by authority.¹⁹

6. Bank's Duty When Note is Endorsed.

(a.) When a note has been endorsed or guaranteed or secured by collaterals, the bank's duty to apply the maker's deposit

16 Muench v. Valley Nat. Bank, 11 Mo. App. 144; People's Bank v. Legrand, 103 Pa. 309; First Nat. Bank v. Shreiner, 110 Pa. 188; First Nat. Bank v. Peltz, 176 Pa. 513, 518; Merchants & Planters' Bank v. Meyer, 56 Ark. 499; National Bank v. Smith, 66 N. Y. 271; Voss v. German-Am. Bank, 83 Ill. 599; State Bank v. McCabe, 135 Mich. 479.

17 Merchants & Mechanics' Bank v. Evans, 9 W. Va. 373. See Long Island Bank v. Townsend, Hill & Denio (N. Y.) 204.

18 Kirkland Land Imp. Co. v. Jones, 18 Wash. 407; Merchants & Planters' Bank v. Meyer, 56 Ark. 499.

19 Riverside Bank v. First Nat. Bank, 20 C. C. A. 181; Bolton v. Richard, 6 Term (Eng.) 139; Aiken v. Short, 1 Hurl. & N. (Eng.) 210; Levy v. Bank, 4 Dail. (U. S.) 234, 236; Peterson v. Union Nat. Bank, 52 Pa. 206; Oddie v. National City Bank, 45 N. Y. 735; Manuf. Nat. Bank v. Swift, 70 Md. 515; First Nat. Bank v. Burkham, 32 Mich. 328.

Contra.—National Park Bank v. Steele Manuf. Co., 58 Hun (N. Y.) 81; Central Bank v. Theim, 76 Hun (N. Y.) 571. See Irving Bank v. Wetherald, 36 N. Y. 335.

A bank returned a discounted note at maturity to a customer who had endorsed it, listing it with other paper that day paid for him at the clearing-house. It also made the usual entries of payments on its books. The customer, however, erased the note from the list, returned it unpaid, and the bank entries were erased. Such action did not constitute payment, or deprive the bank of its previous character of bona fide holder. Holm v. Atlas Nat. Bank, 28 C. C. A. 297.

thereon to protect the endorser, so some courts declare, is more imperative,²⁰ others, that the duty is optional;²¹ others, that none whatever exists.²² By the first rule, if the maker's deposit is sufficient and the bank does not make the application, it has no claim against the endorser.²³ If the deposit is insufficient, the endorser is holden only for the remainder.²⁴ If there be a surety on one of two notes, the bank may apply one-half of the maker's deposit on each note.²⁵ Again, where the optional rule prevails, it covers any deposit made by the depositor after the maturity of his obligation.²⁶

²⁰ McDowell v. Bank, 1 Har. (Del.) 369; Pursifull v. Pineville Bkg. Co., 97 Ky. 154; First Nat. Bank v. Peltz, 176 Pa. 513; Mechanics' Bank v. Seitz, 150 Pa. 632; Faulkner v. Cumberland Valley Bank, 14 Ky. L. Rep. 923; Lowe v. Reddan, 123 Wis. 90; Law v. East India Co., 4 Vesey, Jr. (Eng.) 824; Exchange Bank of Kentucky v. Thomas, 115 Ky. 832. See Kirkland Land & Improvement Co. v. Jones, 18 Wash. 407. "If [a bank] allows the maker to withdraw his funds, after protest, and the endorsers are losers thereby, the bank is liable to them." Newbold v. Boon, 6 Pa. Super. Ct. 511, 514.

²¹ National Mahwae Bank v. Peck, 127 Mass. 298; Glazier v. Douglass, 32 Conn. 393; Brewer v. Knapp, 1 Pick. (Mass.) 332; Upham v. Lefavour, 11 Met. (Mass.) 174; Field v. Holland, 6 Cranch (U. S.) 8; Bank v. Radakissen Mitter, 4 Moore P. C. (Eng.) 140, 162; Third Nat. Bank v. Harrison, 10 Fed. 243; Voss v. German Am. Bank, 83 Ill. 599; Second Nat. Bank v. Hill, 76 Ind. 223; Martin v. Mechanics' Bank, 6 Har. & J. (Md.) 235; Ticonic Bank v. Johnson, 21 Me. 426; Flournoy v. First Nat. Bank, 78 Ga. 222 and 79 Ga. 810; Van Winkle Gin Co. v. Citizens' Bank, 89 Tex. 147. As soon as the liability of an endorser on a note or bill is fixed by non-payment and protest, the endorsee bank has the right to apply any money coming into its possession in due course of business belonging to the endorser, on his liability, and he has no right in law or equity to compel the bank to proceed against the acceptor. But on paying the obligation he has a right to its possession and can proceed against the acceptor. Van Winkle Gin Co. v. Citizens' Bank, 89 Tex. 147, 153 and cases cited.

²² Lamb v. Morris, 118 Ind. 179; London & San Francisco Bank v. Parrott, 125 Cal. 472, 485; O'Grady v. Stotts City Bank, 106 Mo. App. 366.

²³ Central Bank v. Theim, 76 Hun (N. Y.) 571.

²⁴ Lowe v. Reddan, 123 Wis. 90.

²⁵ Ibid.

²⁶ Second Nat. Bank v. Hill, 76 Ind. 223; Martin v. Mechanics' Bank, 6 Har. & J. (Md.) 235; Huchestein v. Herman, 1 Walk. (Pa.) 92; People's Bank v. Legrand, 103 Pa. 309; First Nat. Bank v. Shreiner, 110 Pa. 188; First Nat. Bank v. Peltz, 176 Pa. 513; National Bank v. Smith, 66 N. Y. 271.

(b.) The contention for making an application in such cases imperative is, that the bank, having obtained security for its debt, should be required to apply it for the benefit of the parties who are secondarily liable; it is in effect a trustee for them.²⁷ But the answer to this contention is, the deposit due from the bank is not a collateral security for the note made by the depositor.²⁸

Wherever the rule requires a bank to apply the deposit of its principal debtor, it thereby releases any security it may hold for the debt to the extent of the deposit.²⁹

(b.) In like manner a bank may, but is not required to pay a note presented after maturity for the protection of the endorser. Generally banks decline to pay such notes.³⁰

(c.) Lastly, should a bank apply a deposit, received from the maker after the maturity of his note, for the benefit of the surety or endorser? The affirmative has been maintained;³¹ nevertheless, this is not a general requirement, and if the application is not made, the endorser is not thereby released.³²

7. Application of Insolvent Depositor.

A depositor's money ought not to be applied by a bank knowing that he is insolvent. When, therefore, a bank's duty is imperative to make an application in order to save an en-

27 "The reason of the rule is, that the maker is the principal debtor, and liable to all the endorsers, whose undertaking is to pay if he does not. If the holder surrenders the money or securities of the maker, he parts with that in which all who have a right to look to the maker for indemnity have a definite interest; and if his act inflicts loss on them he must stand, as to the money or securities surrendered, in the place of the maker." Williams, J., Mechanics & Traders' Bank v. Seitz, 150 Pa. 632, 637.

28 Second Nat. Bank v. Hill, 76 Ind. 223, 229; Philbrooks v. McEwen, 29 Ind. 347; Hampton v. Levy, McCord Ch. (S. C.) 107; Lang v. Brevard, 3 Strob. Eq. (S. C.) 59.

29 Dawson v. Real Estate Bank, 5 Ark. 283, 297.

30 Bacon v. Bacon, 94 Va. 686, 693; National Bank v. Smith, 66 N. Y. 271.

31 Bank of Taylorsville v. Hardesty, 91 S. W. (Ky.) 729; Pursifull v. Pineville Bkg. Co., 97 Ky. 154.

32 Citizens' Bank v. Elliott, 9 Kan. App. 797; People's Bank v. Legrand, 103 Pa. 309; Houston v. Braden, 37 S. W. (Tex. Civ. App.) 467.

dorser from harm and to refrain from applying the deposit in order to avoid an illegal preference, what course shall the bank pursue? It would seem that the latter duty is the higher, consequently it should withhold the application.³³ And the same rule applies to an insolvent depositor who deposits expecting that the bank will make a speedy application and thus prefer one creditor to another.³⁴

8. Presentment of Note After Maturity.

In like manner a bank may, but is not required to pay a note presented after maturity.³⁵ And in the states where the assignment rule prevails, a bank may do this even though the maker had previously given a check on the bank, but not presented it until after the application had been made.³⁶ Indeed, should the depositor appear himself with his check and demand payment, the bank can apply his deposit to pay his indebtedness to the bank instead of paying him.³⁷

9. Application of Deposit of Endorser.

A bank cannot appropriate the fund of a depositor who is

³³ Mt. Sterling Bank v. Pries^t, 111 Ky. 886; Northern Bank v. Farmers' Nat. Bank, 111 Ky. 350; Exchange Bank v. Thomas, 115 Ky. 832. See Chap. XVII, §8. If a deposit is not withdrawn before the maturity of the note of an insolvent depositor it may be applied thereon. Ontario Bank v. Routhier, 32 Ont. (Can.) Rep. 67. A sent to a bank for collection a note made by one of its depositors who had directed the bank to pay his notes. The cashier drew a check to A's order for the amount, made a memorandum thereof, wrote "paid" on the face of the note, perforated and filed it. He was then notified of the depositor's failure, but could not escape remitting the check. Nineteenth Ward Bank v. First Ward Bank, 184 Mass. 49. A deposit made by a depositor after his insolvency is openly known to the bank, may be kept and applied to a note given before. Clark v. Northampton Nat. Bank, 160 Mass. 26.

³⁴ Ibid.

³⁵ §6c. Marsh v. Oneida Central Bank, 34 Barb. (N. Y.) 298; Second Nat. Bank v. Hill, 76 Ind. 223.

³⁶ Niblack v. Park Nat. Bank, 169 Ill. 517, 521; Bank of Commerce v. Franklin, 90 Ill. App. 91.

³⁷ Ibid.

a guarantor in payment of the obligation³⁸ or not until the other parties have been exhausted,³⁹ but the deposit of an endorser who is liable may be applied,⁴⁰ and also any subsequent deposit to a note that has been discounted for his benefit.⁴¹

10. Liability of Party on Collateral is Not Affected by Non-Application of Borrower's Deposit.

The liability of a party on a collateral taken by a bank as security for a discount is not affected by its failure to apply the borrower's deposit at a time when it was sufficient to meet his obligation.⁴²

Doubtless a bank can make an agreement to apply his collaterals and their proceeds on other notes than the one for which they are first pledged. But authority to do this must be clearly expressed. Therefore the deposit of collateral security for the payment of a particular note "and also of all other present or future demands of any kind of said bank" with authority to sell the collateral and apply the proceeds to the payment of the particular note is not a sufficient justification for selling the security and applying the proceeds on any other. The last application of the proceeds controls the former.⁴³

11. Time During Day for Presentation.

A note made payable at a bank implies that it should be paid during banking hours, hence payment can be demanded at any time during that period.⁴⁴ Should no demand be made, the maker is not in default until the close of the banking day.⁴⁵

38 *Harrison v. Harrison*, 20 N. E. (Ind.) 746; *O'Grady v. Stotts City Bank*, 106 Mo. App. 366.

39 *Lamb v. Morris*, 118 Ind. 179; *First Nat. Bank v. Shreiner*, 110 Pa. 188.

40 *Van Winkle Gin Co. v. Citizens' Bank*, 89 Tex. 147.

41 *First Nat. Bank v. Shreiner*, 110 Pa. 188; *Lamb v. Morris*, 118 Ind. 179.

42 *Third Nat. Bank v. Harrison*, 10 Fed. 243.

43 *First Nat. Bank v. Ill. Trust & Sav. Bank*, 84 Fed. 34.

44 *National Ex. Bank v. National Bank*, 132 Mass. 147; *Gordon v. Parmelee*, 15 Gray (Mass.) 413; *Estes v. Tower*, 102 Mass. 65; *Pierce v. Cate*, 12 Cush. (Mass.) 190.

45 *National Ex. Bank v. National Bank*, 132 Mass. 147; *Church v.*

The sending of a note through the clearing-house to the bank at which it is payable is not a formal demand for immediate payment, but equivalent to leaving it at the bank for collection from the maker on or before the close of business hours.⁴⁶ By the rules of many clearing-houses the payment of a note through this institution is only provisional and does not become complete until the note is paid in the usual course of business. If not thus paid, the payment by the clearing-house may be treated as a mistake of fact and may be corrected.⁴⁷

12. Mode of Presentation. Recovery.

To acquire the right of recovery against the maker of a note payable at a particular bank, it need not be presented there for payment.⁴⁸ "The failure to make presentment at the bank does not relieve the maker from his promise to pay, but only relieves him from damages in case he is ready at the bank to pay, and there is no one there to receive the money."

And if a bank without authority pays a depositor's note and charges it to his account and returns it with his cancelled checks, there need not be a re-delivery to the bank before bringing an action thereon to recover the amount thus wrongfully paid.⁴⁹

Clark, 21 Pick. (Mass.) 310; Clark v. Eldridge, 13 Met. (Mass.) 96; U. S. Bank v. Carneal, 2 Pet. (U. S.) 543, 549; Staples v. Franklin Bank, 1 Met. (Mass.) 43, 50, 54, 56.

46 National Ex. Bank v. National Bank, 132 Mass. 147.

47 Ibid.

48 Dillingham v. Parks, 30 Ind. App. 61, 70. "Such facts are regarded as equivalent to a tender of the sum payable; and an answer showing such tender and payment of the money due into court will bar a recovery of interest and costs, but will not bar the cause of action on the note." Ibid. See §6d.

49 Elliott v. Worcester Trust Co., 189 Mass. 542. A, after giving a note payable at B bank, compromised with his creditors and received a release from the holder, and A notified the bank of his release. Subsequently C bank took over the assets and liabilities of B bank, including a deposit belonging to A. It was held that C bank was bound to know the terms by which the deposit was held by the B bank, and had no authority to pay the note out of A's deposit. Ibid.

13. Different Rule to Bank as Owner or Agent.

Do different rules apply to a bank that is the owner of a note made payable at the bank than to such a bank acting as agent? In a well-reasoned Kentucky case⁵⁰ a distinction is suggested; in other words, there is no doubt concerning the propriety of applying the rules to a bank that owns the paper. But as they are based on the direction or command of the maker, are they not just as imperative in the one case as in the other?

14. Bank is Not Maker's Agent of Note Without Possession.

The bank does not become the holder's agent of such notes for obtaining payment unless his paper is put into the bank's possession. Says the court in one of the cases, "To make the bank the payee's agent, either the paper must be endorsed to or deposited with it."⁵¹ This is the well-settled rule.⁵²

15. When Bank is Payor's Agent.

The bank may also become the payor's agent by his leaving money with the bank to apply on his obligation.⁵³ The bank's obligation is the same toward a non-depositor. The bank is equally responsible in both cases for the safekeeping and proper application of the money.⁵⁴

⁵⁰ Pursifull v. Pineville Bkg. Co., 97 Ky. 154.

⁵¹ Caldwell v. Evans, 5 Bush (Ky.) 380.

⁵² Adams v. Hackensack Imp. Commission, 44 N. J. Law 638; Bank of Montreal v. Ingerson, 105 Iowa 349, overruling Lazier v. Horan, 55 Iowa 75; St. Paul Nat. Bank v. Cannon, 46 Minn. 95; Hills v. Place, 48 N. Y. 520; Williamsport Gas Co. v. Pinkerton, 95 Pa. 62; Wood v. Merchants' Sav. & Trust Co., 41 Ill. 267; State Nat. Bank v. Hyatt, 75 Ark. 170; Cheney v. Libbey, 134 U. S. 68. See §1.

⁵³ Glatt v. Fortman, 120 Ind. 384; Dillingham v. Parks, 30 Ind. App. 61, 70; Wallace v. M'Connell, 13 Pet. (U. S.) 136; Brabston v. Gibson, 9 How. (U. S.) 263; Ward v. Smith, 7 Wall. (U. S.) 447; Wood v. Merchants' Sav. & Trust Co., 41 Ill. 267; Adams v. Hackensack Imp. Commission, 44 N. J. Law 638; Williamsport Gas. Co. v. Pinkerton, 95 Pa. 62; St. Paul Nat. Bank v. Cannon, 46 Minn. 95. See Hills v. Place, 48 N. Y. 520.

⁵⁴ Ibid. A bank held B's note payable at C. The maker left enough money with D at C to pay it and notified the bank. The bank wrote D to send or bring the money. It was stolen. The deposit with D was not pay-

16. At What Time Must Money be Applied.

The money is sometimes received a few days before the maturity of the paper, and there is a conflict of opinion whether the bank should apply it soon as the paper is received, or wait until its maturity. Perhaps the better opinion is that it cannot apply the money without the holder's consent until the paper matures.⁵⁵ By this rule, if the bank fails before the paper matures and the money is applied, the payor is the loser. If, however, the money exists, it can be recovered from the assignee or receiver, for being a trust fund it is governed by trust principles. Of course, no payment can be made in advance that will operate as an illegal preference.⁵⁶

17. Bank's Failure After Maturity of Paper.

If a bank fails before receiving the paper, the maker, who has deposited funds there for its payment, must be the loser, because the bank does not become the payee's agent to receive them until the paper is received and has matured.⁵⁷ If both are received before the maturity of the paper, and the bank fails after its maturity without having applied the money, the loss, so it has been judicially declared, falls on the maker.⁵⁸ This rests on the theory that the bank, although a double agent, is acting as the payor's agent or bailee until the fulness of time for applying the money.

ment, for D was in no sense the bank's agent. *First Nat. Bank v. Free*, 67 Iowa 11.

55 *Home Nat. Bank v. Newton*, 8 Ill. App. 563, 569.

A bank at which notes are made payable is not authorized, after assigning them as collateral security, to receive payment on them before they are due and while they are not in the bank's possession. *Bank of Montreal v. Ingerson*, 105 Iowa 349. While the Negotiable Instruments law provides that a note payable at a bank is equivalent to an order to pay it for the account of the principal debtor, this is no authority to pay a note made long before payable at another bank. *Elliott v. Worcester Trust Co.*, 189 Mass. 542.

56 See §18.

57 *Peak v. Ellicott*, 30 Kan. 156; *Ellicott v. Barnes*, 31 Kan. 170; *Ward v. Smith*, 7 Wall. (U. S.) 447.

58 *Peak v. Ellicott*, 30 Kan. 156.

On the other hand, if the money still exists, the owner can recover it;⁵⁹ for as the relation of debtor and creditor is not created by receiving the money, it belongs to the owner until it is properly applied.⁶⁰

18. Who Must Lose by Paying Paper in Illegal Notes.

Various questions have arisen concerning the use of illegal notes and other paper as payment. The holder of an illegal note issued by an incorporated bank cannot recover from one who has endorsed it for the reason he knew, when taking it, of its illegal character. He was not an innocent holder without notice.⁶¹ In like manner a draft drawn by a bank in express violation of its charter, if used to pay a debt, is ineffective because it was illegal and this was known to all by reason of the bank's public character. Whether the payor and payee were both innocent, or one or neither, the law charged them both with knowledge of its true character.⁶²

59 Ibid.

60 Ibid.

61 Root v. Wallace, 4 McLean (U. S.) 8; Root v. Godard, 3 McLean 102.

62 Davis v. Bank, 4 McLean 387; Weed v. Snow, 3 McLean 265.

CHAPTER XXVII.

ACTIONS.

<ol style="list-style-type: none">1. Holder cannot sue drawee.2. Except in States where check is an assignment of deposit.3. Or check has been accepted.4. Equitable assignment.5. Holder may acquire the right to sue for a particular fund.6. Payment of forged check is not acceptance of true one.7. Depositor or holder must de-	<ol style="list-style-type: none">mand payment before suing drawee bank.a. Unless bank is insolvent.b. Or deposit is illegal.8. Suit by holder against drawer.9. Suit against endorser.10. Operations of statute of limitations.11. Suit by and against national bank.
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1. Holder Cannot Sue Drawee.

Though a bank is bound to honor the checks of a depositor having sufficient funds, and is liable to him in damages for neglecting to pay them,¹ there is no contract relation whatever ordinarily between the holder of a check and the drawee bank. Consequently, on its refusal to pay the holder's remedy is against the maker; while his remedy, in turn, is against the bank unless it can give a satisfactory reason for its conduct.²

¹ Chap. XX. §42. *McIntyre v. Farmers & Merchants' Bank*, 115 Mich. 255; *Grammel v. Carmer*, 55 Mich. 201.

² *Bank v. Millard*, 10 Wall. (U. S.) 152; *Bank v. Russell*, 2 Dill. (U. S.) 215; *First Nat. Bank v. Whitman*, 94 U. S. 343; *Fourth St. Bank v. Yardley*, 165 U. S. 634; *Merchants & Planters' Bank v. Meyer*, 56 Ark. 499, 508; *National Com. Bank v. Miller*, 77 Ala. 168; *People's Sav. Bank v. Lacey*, 40 So. (Ala.) 346; *Carr v. National Security Bank*, 107 Mass. 45; *Northern Trust Co. v. Rogers*, 60 Minn. 208; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. Law 255; *National Bank v. Berrall*, 70 N. J. Law 757; *Hawes v. Blackwell*, 107 N. C. 196; *Perry v. Bank*, 131 N. C. 117; *Love v. Ardmore Stock Exchange*, 5 Indian Terr. 202; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324; *First Nat. Bank v. Clark*, 134 N. Y. 368; *First Nat. Bank v. McMichael*, 106 Pa. 460; *Pickle v. Muse*, 88 Tenn. 380; *Pease & Dwyer Co. v. State Nat. Bank*, 88 S. W. (Tenn.) 172; *Purcell v. Allemong*, 22 Gratt. (Va.) 739, 742; *Donohoe-Kelly Bkg. Co. v. Southern Pacific Co.*,

This also is the rule wherever the Negotiable Instruments law prevails. It plainly declares that "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."³

2. Except in States Where Check is an Assignment of Deposit.

In Illinois,⁴ South Carolina,⁵ Louisiana,⁶ Iowa⁷ and South Dakota⁸ the opposite rule prevails; the check operates as an assignment of the maker's deposit; and the holder can sue the drawee bank on its refusal to pay. The courts of Missouri, Ohio, Wisconsin, Kentucky, Texas and Nebraska were, for several years dazzled by the new rule; at length they have returned to the older and safer one.⁹ Their judicial wanderings are interesting, if not luminous reading. Gladdened by the fresh sight of justice contained in the new doctrine, they did not then foresee the ill consequences that would result from its application. While the old rule is singularly defective in some regards, as will soon appear, experience has clearly shown its superiority, both as a measure of law and justice, over its waning competitor.

¹³⁸ Cal. 183; N. Y. Life Ins. Co. v. Patterson, 35 Tex. Civ. App. 447, 452; House v. Kountze, 17 Tex. Civ. App. 402; Terry v. Dale, 27 Tex. Civ. App. 1; Jones v. Pacific Wood Co., 13 Nev. 359; Guthrie Nat. Bank v. Gill, 6 Okla. 560; State v. Bank, 49 La. Ann. 1060, 1078; Caldwell v. Merchants' Bank, 26 U. C. 294; Lamb v. Sutherland, 37 U. C. 143; Hopkinson v. Forster, L. R. 19 Eq. (Eng.) 74.

³ Baltimore & Ohio R. v. First Nat. Bank, 102 Va. 753.

⁴ Munn v. Burch, 25 Ill. 35. This case led in the departure; National Bank v. Indiana Bkg. Co., 114 Ill. 483; Niblack v. Park Nat. Bank, 169 Ill. 517.

⁵ Fogarties v. State Bank, 12 Rich. Law. (S. C.) 518; Simmons Hardware Co. v. Greenwood Bank, 41 S. C. 177; Loan & Sav. Bank v. Farmers' & Merch. Bank, 54 S. E. 364.

⁶ Gordon v. Muchler, 34 La. Ann. 604.

⁷ Bloom v. Winthrop State Bank, 121 Iowa 101; Roberts v. Corbin, 26 Iowa 315.

⁸ Turner v. Hot Springs Nat. Bank, 101 N. W. (S. Dak.) 348.

⁹ Roe v. Bank of Versailles, 167 Mo. 406; Cincinnati, Ham. & Dayton R. v. Bank, 54 Ohio St. 60; Neg. Inst. Law, Laws 1902, p. 196; Wis. Laws,

A large branch has been recently cut off the assignment rule by the federal tribunals. The assignment of a deposit in a national bank is nullified by its insolvency; otherwise the holders of outstanding checks would obtain an undue preference over other creditors.¹⁰

Nevertheless, most of the states that maintain this rule maintain quite as firmly another rule with minor modifications, that a contract founded on a genuine consideration, for the benefit of a third person, can be enforced by him in his own name. This rule, though an exception to the still greater one, that a contract cannot confer rights on a person who is not a party thereto, prevails in more than thirty states in the Union, including a majority of the older ones;¹¹ indeed, in several of them the rule of the court has been fortified by legislative approval.

Is not the denial of this right to a checkholder a plain in-

1899, Ch. 396; for construction, see *Raesser v. National Ex. Bank*, 112 Wis. 591, 596; *Weiand v. State Nat. Bank*, 112 Ky. 310; *Boswell v. Citizens' Sav. Bank*, 96 S. W. 797; *Laws*, 1904; *House v. Kountze*, 17 Tex. Civ. App. 402; *Nebraska Laws*, 1905.

10 *First Nat. Bank v. Selden*, 56 C. C. A. 532.

11 *Lovely v. Caldwell*, 4 Ala. 684; *Hecht v. Caughron*, 46 Ark. 132; *Green v. Richardson*, 4 Colo. 584; *Crocker v. Higgins*, 7 Conn. 342; *Clapp v. Lawton*, 31 Conn. 95; *Cobb v. Heron*, 180 Ill. 49; *Day v. Patterson*, 18 Ind. 114; *Beeson v. Green*, 103 Iowa 406; *German Sav. Bank v. Northwestern Water & Light Co.*, 104 Iowa 717; *Smith v. Lewis*, 3 B. Mon. (Ky.) 229; *St. Joseph's Assn. v. Maguire*, 16 La. Ann. 338; *Coffin v. Bradbury*, 89 Me. 476; *Seigman v. Hoffacker*, 57 Md. 321; *Sweatman v. Parker*, 49 Miss. 19; *Thornton v. Smith*, 7 Mo. 86; *Kaufman v. U. S. Nat. Bank*, 31 Neb. 661; *Schermerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139; *Lawrence v. Fox*, 20 N. Y. 268; *Kelly v. Roberts*, 40 N. Y. 432, 438; *Dingeldien v. Third Av. R.*, 37 N. Y. 575; *Del. & Hudson Canal Co. v. Westchester Co. Bank*, 4 Denio (N. Y.) 97; *Parlin v. Hall*, 2 N. Dak. 473; *Brower Lumber Co. v. Miller*, 28 Or. 565; *Hind v. Holdship*, 2 Watts (Pa.) 104; *Sparks v. Hurley*, 208 Pa. 166, 173, 174; *M'Carty v. Blevins*, 5 Yerg. (Tenn.) 195; *Grant v. Diebold Safe Dep. Co.*, 77 Wis. 72; *Larson v. Cook*, 85 Wis. 564; *National Bank v. Grand Lodge*, 98 U. S. 123; *Welden Nat. Bank v. Smith*, 86 Fed. 398; *Austin v. Seligman*, 18 Fed. 519, containing a discussion of the subject. See an elaborate and valuable note on this subject in 71 Am. St. Rep. 176-207, also *Constable v. National Steamship Co.*, 154 U. S. 51, 72-74.

fraction? That there is an implied promise on the part of the depositary to the depositor to repay the amount deposited, upon the checks of the depositor, is the doctrine of all the cases and law writers. It is true that the bank's well understood agreement with a depositor to pay his checks so long as his funds are sufficient does not mention the name of any third party, but is this omission any reason for regarding the requirement less effective? Legal and moral progress, however, does not always advance along logical lines; and experience has clearly shown the unwisdom of extending the right of a third person to sue a checkholder. The experience of Illinois especially is a loud warning to other states of the frauds and other dangerous consequences resulting from the extension of the rule.

3. Or Check Has Been Accepted.

By accepting a check a bank becomes liable therefor to the holder.¹² Certification is clearly an acceptance,¹³ which in most states must be in writing,¹⁴ otherwise it is invalidated by the statute of frauds; in others, a verbal acceptance will suffice.¹⁵ Whether a check is accepted or not is a fact of which the purported certification, or other evidence must furnish the evidence.¹⁶ A check may be accepted conditionally, for example, that the acceptor will not pay A or B.¹⁷

¹² Perry v. Bank, 131 N. C. 117, 119; First Nat. Bank v. McMichael, 106 Pa. 460; Lunt v. Bank, 34 Barb. (N. Y.) 221.

¹³ See Chap. XXIII. §5.

¹⁴ Risley v. Phenix Bank, 83 N. Y. 318; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325; Duncan v. Berlin, 60 N. Y. 151; Chapman v. White, 6 N. Y. 412; Luff v. Pope, 5 Hill (N. Y.) 413; Harker v. Anderson, 21 Wend. (N. Y.) 372; National State Bank v. Lindeman, 161 Pa. 199; Maginn v. Dollar Sav. Bank, 131 Pa. 362; Espy v. Bank, 18 Wall. (U. S.) 604. See Morse v. Mass. Nat. Bank, 1 Holmes, (U. S.) 209.

¹⁵ Nelson v. First Nat. Bank, 48 Ill. 36; Barnet v. Smith, 30 N. H. 256; Merchants' Nat. Bank v. First Nat. Bank, 7 W. Va. 544.

¹⁶ First Nat. Bank v. McMichael, 106 Pa. 460; Seventh Nat. Bank v. Cook, 73 Pa. 483. A bank may so act toward the presentor of a check as to lead him to believe that the depositor has a sufficient fund for paying it, when, in truth, he has not, and thereby be estopped from denying its liability after the truth is known. Rostad v. Union Bank, 85 Minn

4. Equitable Assignment.

Notwithstanding the above rule, in some states the holder of a check given for an entire deposit can sue the bank for the amount.¹⁸ This is called an equitable assignment. But if a check, given for the entire amount of one's deposit, operates in this manner, why should not a check given for a smaller amount? The reason on which the distinction is based, that equity will not sanction the splitting up of a demand against a creditor, is purely technical, for a bank expects at the time of accepting a deposit to repay in as many sums as the depositor may desire. The rule in equity should give way to the actual agreement. The illogical character of this distinction is so patent that many courts have declined to recognize it.¹⁹

Is this principle overthrown by the Negotiable Instruments law? That a check for an entire deposit should work an assignment of it, while a check for a portion does not, is so illogical, perhaps the courts will no longer seek to preserve the distinction. We need waste no space in attempting to answer a question which only the courts can decide.

5. Holder May Acquire the Right to Sue for a Particular Fund.

While the better rule, that the giving of a check for an entire deposit, works the same result as the giving of a check for a part only, all authorities are harmonious in holding that

313. Certificates of deposit had been presented for payment and after the presentor, at the cashier's request, had endorsed two of them he was forbidden by the president to pay them though the bank had sufficient funds. The bank closed immediately and sought to establish a preference, on the ground that the checks had been accepted, but it was not sustained. St. Mary's Church v. National Bank, 23 N. Y. Misc. 588.

17 Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 738. See Benedict v. Cowden, 49 N. Y. 396.

18 Moore v. Davis, 57 Mich. 251, 255; Taylor's Estate, 154 Pa. 183; Hemphill v. Yerkes, 132 Pa. 545; Dowell v. Vandalia Bkg. Assn., 62 Mo. App. 482; Covert v. Rhodes, 48 Ohio St. 66, 73; Kingman v. Perkins, 105 Mass. 111; Mandeville v. Welch, 5 Wheat. (U. S.) 277. See Chap. XXVIII. §11.

19 Harrison v. Wright, 100 Ind. 515; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325; Chapman v. White, 6 N. Y. 412; Lunt v. Bank, 49 Barb. (N. Y.) 221; Fulton v. Gesterding, 36 So. (Fla.) 56.

a check drawn for, or paid from, a specific fund accomplishes the purpose intended, its transfer.²⁰ And the same right may be acquired by an agreement, either oral or written, clearly showing that the depositor has made a present assignment of his fund in the bank. In *Risley v. Phenix Bank*,²¹ with a check given by the drawer to the payee was also given an oral agreement, founded on a consideration, to assign a similar amount of the drawer's deposit. The check was given for the purpose of enabling the payee to collect and receive the debt assigned. The check, so the court held, did not embody the contract between the parties and prevent the admission of parol evidence of the agreement. Furthermore, the special assignment was sufficient to vest in the payee the debt and

²⁰ *Rodick v. Gandell*, 12 Beav. (Eng.) 325; *Commonwealth v. Am. Life Ins. Co.*, 162 Pa. 586; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Ballou v. Boland*, 14 Hun (N. Y.) 355, and cases cited; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325; *Hall v. City of Buffalo*, 2 Abb. Dec. (N. Y.) 301; *Erickson v. Inman*, 34 Or. 44; *Mandeville v. Welch*, 5 Wheat. (U. S.) 286; *Fourth St. Bank v. Yardley*, 165 U. S. 634, reviewing many cases. In *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, it was held that a sight draft payable to the order of a bank, directing the drawee to charge the amount to a particular account does not constitute an assignment of the fund. Such a direction does not make it "payable conditionally, or out of a particular fund; it is still payable absolutely, and is negotiable, and does not constitute an assignment of a particular fund, or of a part of a particular fund." The court cited, *Robey & Co.'s Perseverance Iron Works v. Ollier*, L. R. 7 Ch. (Eng.) 695; *In re Entwistle*, 3 Ch. Div. (Eng.) 477; *Griffin v. Weatherby*, L. R. 3 Q. B. (Eng.) 753; *Banner v. Johnston*, L. R., 5 H. of L. (Eng.) 762; *Houssoullier v. Hartsnick*, 7 T. R. (Eng.) 733; *Macleed v. Snee*, 2 Str. (Eng.) 762; *Wells v. Brigham*, 6 *Cush.* (Mass.) 6; *Redman v. Adams*, 51 Me. 429; *Corbett v. Clark*, 45 Wis. 403; *Coursin v. Ledlie*, 31 Pa. 506; *Kelley v. Brooklyn*, 4 Hill (N. Y.) 263; *Early v. McCart*, 2 Dana (Ky.) 414; *Spurgin v. McPheeters*, 42 Ind. 527. Checks drawn on a distinct deposit, kept by the superintendent of a sugar refinery separate from his general account, to pay workingmen, operate as an equitable assignment and may be paid out of the deposit after the failure of the refinery. *Fortier v. Delgado*, 59 C. C. A. 180.

²¹ 83 N. Y. 318. *Coates v. First Nat. Bank*, 91 N. Y. 20. See §4, note 20. *Utley v. Tolfree*, 77 Mo. 307. If a bank agrees to honor the check of a drawer given in payment of a particular thing, secured by a bill of lading of it, the bank is liable to the holder of the check. *Falls City State Bank v. Wehrli*, 68 Neb. 75. A sold merchandise to B, who offered to a

enable him to sue therefor.²² "The crucial test," says the Supreme Court of Georgia, "is that the assignor must not retain any control over the fund,—any authority to collect, or any power of revocation. The transfer must be of such a character that the holder of the fund can safely pay, and is compellable to do so, though forbidden by the assignor."²³ What agreement is sufficient for this purpose must, of course, depend on its terms.²⁴

The agreement or promise is not less binding by putting the deposit in the depositor's name; nor by his additional promise to deposit more to cover his indebtedness to the bank.²⁵ But a promise by a bank to a depositor to pay all the checks he may afterwards draw thereon is very different in its nature and will not pass to third persons who may become holders.²⁶

Again, a bank's indebtedness to a contractor is not a fund subject to his checks, and consequently their non-payment furnishes no basis for an action to recover damages for the injury sustained by the drawer to his credit.²⁷ Yet the indebt-

bank for discount a draft with a bill of lading attached, drawn on his principal C, and at the same time delivered his check on the bank payable to A's order for the same amount. The bank agreed to collect the draft and credit B's account with the amount, and to hold the check received from A against the credit. All the parties agreed to this arrangement. The check was regarded as an appropriation of the proceeds of the draft, and the bank was liable to A therefor. *Parkersburg Mill Co. v. Farmers & Traders' Nat. Bank*, 82 S. W. (Ky.) 1003.

²² *Risley v. Phenix Bank*, 83 N. Y. 318, 324; see full discussion of the subject by Andrews, J.

²³ *Evans, J., Rievere v. Chambliss*, 120 Ga. 714, 716; *Christmas v. Russell*, 81 U. S. 84. And where it clearly appears that it was the intention of the parties to assign all, or part of the specific fund or deposit, the maker cannot revoke his check or order. *Pease v. State Nat. Bank*, 114 Tenn. 693; *Fourth St. Bank v. Yardley*, 165 U. S. 634.

²⁴ *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83; *First Nat. Bank v. Clark*, 134 N. Y. 368; *Fourth St. Bank v. Yardley*, 165 N. Y. 634.

²⁵ Cases in note 20.

²⁶ *Carr v. National Security Bank*, 107 Mass. 45; *Street v. Goodale*, 77 Mo. App. 318.

²⁷ *McKnight v. Bank of Acadia*, 114 La. 289.

edness may be assigned, though it is indivisible and cannot be assigned to different persons without the debtor's consent.²⁸

In all cases of this character the bank must be notified that the check has been given, otherwise the deposit is subject to the same rules as any other deposit.²⁹

6. Payment of Forged Check is Not Acceptance of True One.

Again, the true payee of a forged check cannot sue the drawee bank on the theory that, by paying on the forged endorsement and charging the amount to the maker, it has been accepted.³⁰ The reasoning in the Whitman case is conclusive and should settle the question, notwithstanding the rulings to the contrary.³¹ But the true owner or holder of a certified check, which is subsequently paid on a forged endorsement of the payee's name, can sue the drawee bank for the amount.³²

7. Depositor or Holder Must Demand Payment Before Suing Drawee Bank.

Before the depositor or holder can sue his bank he must demand payment.³³ There is hardly need to state the rule, for rarely does one plunge into a lawsuit to obtain money that may be had by the simple presentation of the proper order or authority therefor.

28 McKnight v. Bank of Acadia, 114 La. 289.

29 Laclede Bank v. Schuler, 120 U. S. 511.

30 First Nat. Bank v. Whitman, 94 U. S. 343, 346; Freeman v. Savannah Bank, 88 Ga. 252; Houston Grocer Co. v. Farmers' Bank, 71 Mo. App. 132.

31 Seventh Nat. Bank v. Cook, 73 Pa. 483; Pickle v. Muse, 88 Tenn. 380, 385; Dodge v. National Ex. Bank, 20 Ohio St. 234; Millard v. National Bank, 3 MacArthur (D. C.) 54.

32 Laue v. Nuffer, 5 N. Y. Supp. 421; Thomson v. Bank, 82 N. Y. 1, 7.

33 Lester v. Given, 8 Bush (Ky.) 357; Herndon v. Louisville Bkg. Co., 10 Ky. L. Rep. 584; Tobias v. Josiah Morris & Co., 126 Ala. 535, 547; Downes v. Phoenix Bank, 6 Hill (N. Y.) 297; Payne v. Gardiner, 29 N. Y. 146; Chemical Nat. Bank v. Bailey, 12 Blatchf. (U. S.) 480. A receiver of a depositor who writes for his deposit and receives in reply a notice that he is indebted to the bank for a larger amount is a demand and denial to pay. Delahunty v. Central Nat. Bank, 37 N. Y. App. Div. 434. How should a demand be made, see dissenting opinion by Ramsey, J., in the case last cited.

(a.) A different rule applies to an insolvent bank; no demand is then required.³⁴

(b.) In like manner, if the contract is illegal and cannot be enforced, the money can be recovered without first demanding payment of the bank.³⁵

8. Suit by Holder Against Drawer.

In an action by the holder against the drawer he must allege that payment was demanded of the drawee and refused,³⁶ and that notice of non-payment was sent to the drawer,³⁷ unless there was a legal excuse for not notifying him.³⁸ But this rule of pleading is not universal. As we have seen, the drawer of a check does not stand on the same plane as the drawer of a bill of exchange. In the latter case negligence in presenting the bill to the drawee or in notifying him discharges the drawer. But, as the drawer of a check is the principal debtor, he is not discharged by the holder's negligence in presentation and notification unless he has thereby suffered loss, and then only to the extent of his loss. Therefore, the Supreme Court of Minnesota holds that "it logically

34 Colton v. Drovers' Perpetual B. & L. Assn., 90 Md. 85; Planters' Bank v. Farmers & Mech. Bank, 8 Gill & J. (Md.) 449; Watson v. Phoenix Bank, 8 Met. (Mass.) 217; Thurston v. Wolfborough Bank, 18 N. H. 391; Arnold v. Hart, 176 Ill. 442, affd. 75 Ill. App. 165; White v. Meadowcroft, 91 Ill. App. 293; Meadowcroft v. People, 163 Ill. 56, 82; Thompson v. Union Trust Co., 130 Mich. 508; Barnes v. Arnold, 45 N. Y. App. Div. 314, affd. 169 N. Y. 611; Sickles v. Herold, 149 N. Y. 332; Van Alstyne v. National Com. Bank, 4 Abb. Dec. (N. Y.) 449; Davis v. Industrial Mfg. Co., 114 N. C. 321; McGowan v. McDonald, 111 Cal. 57; Scott v. Armstrong, 146 U. S. 499; Bank v. Millard, 10 Wall. (U. S.) 152.

35 Ward v. Johnson, 95 Ill. 215.

36 Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178; Harker v. Anderson, 21 Wend. (N. Y.) 372; Murray v. Judah, 6 Cow. (N. Y.) 484; Pollard v. Bowen, 57 Ind. 232; Glenn v. Noble, 1 Blackf. (Ind.) 104; Brahm v. Adkins, 77 Ill. 263; Purcell v. Allemong, 22 Gratt. (Va.) 739; Girard Bank v. Bank of Penn Township, 39 Pa. 92. The holder of a post-dated check must give a similar notice. Bradley v. Delaplaine, 5 Harr. (Del.) 305.

37 Ibid.

38 Pollard v. Bowen, 57 Ind. 232; Griffen v. Kemp, 46 Ind. 172; Case v. Morris, 31 Pa. 100.

follows in an action against the drawer it is not necessary to allege, as a part of the cause of action, notice of dishonor or the absence of loss by reason of the failure to give such notice.³⁹ Whatever the rule of pleading may be, the drawer cannot defeat a recovery on the ground of delay in presentation beyond the prescribed time without clearly showing an injury arising from the delay.⁴⁰

A presentation is not necessary when the drawer at the time of delivering his check had no funds in the bank.⁴¹ To give a check under these conditions is a fraud.⁴²

And when the maker of a check has been defrauded by wrongfully obtaining a check from him, the burden of proof is on the holder to show that he took the check in the usual course of business, for a valuable consideration, without knowledge of the facts affecting its validity between the original parties, "and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the check was invalid as between the antecedent parties."⁴³

9. Suit Against Endorser.

To recover of the endorser the holder must show that he demanded payment from the drawee, even though the bank had no funds belonging to the drawer.⁴⁴

10. Operation of Statute of Limitations.

Lastly, may be considered how the statute of limitations

39 Spink & Keyes Drug Co. v. Ryan Drug Co., 72 Minn. 178, 179.

40 Cox v. Citizens' State Bank, 85 Pac. (Kan.) 762; Noble v. Doughten, 83 Pac. (Kan.) 1048, and cases cited.

41 Haynes v. Wesley, 112 Ga. 668; Bell v. Alexander, 21 Gratt. (Va.) 1, 6; City Nat. Bank v. Burns, 68 Ala. 267; Fletcher v. Pierson, 69 Ind. 281; Culver v. Marks, 122 Ind. 554; Offutt v. Rucker, 2 Ind. App. 350; Beauregard v. Knowlton, 156 Mass. 395; Hoyt v. Seelye, 18 Conn. 353; Foster v. Poulk, 41 Me. 425, 428; Case v. Morris, 31 Pa. 100, 104.

42 Ibid.

43 Capital Sav. Bank v. Montpelier Sav. Bank, 59 At. (Vt.) 827, the court citing Roth v. Allen, 32 Vt. 125; Gould v. Stevens, 43 Vt. 125; Passumpsic Sav. Bank v. First Nat. Bank, 53 Vt. 82; Bank of Republic v. Baxter, 31 Vt. 101; Bromley v. Hawley, 60 Vt. 50.

44 Carroll v. Sweet, 128 N. Y. 19.

operates to cut off the liability of the several parties. The statute does not begin to run against a depositor and in favor of the bank until he has demanded his deposit;⁴⁵ nor against the holder's right to proceed against the bank, or the drawer, until the end of the statutory period after presentation and a refusal to pay.⁴⁶ But when a presentation is not necessary, because the drawer has no money in the bank, then the statute begins to run from the date of the check.⁴⁷

11. Suit By and Against National Bank.

By the law of 1888, national banks are regarded the same as individuals in suits by and against them. Where an individual can sue in a state or federal court a national bank can do likewise; and where the federal courts are not open to individuals they are not to the national banks.⁴⁸ In the words of Judge Hook in a recent case: "A suit which may be brought in a circuit court by or against a citizen of a state because it arises under the constitution, laws, or treaties of the United States may for the same reason be brought in such court by or against a national bank located in the same state."⁴⁹

45 Bull v. First Nat. Bank, 123 U. S. 105, 111; Thurston v. Wolfborough Bank, 18 N. H. 391; Girard Bank v. Bank of Penn Township, 39 Pa. 92; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 333; Koelzer v. First Nat. Bank, 125 Wis. 595; Howell v. Adams, 68 N. Y. 314; Bank v. Merchants' Nat. Bank, 91 N. Y. 106, 110; Stewart v. Smith, 17 Ohio St. 82; Lattin v. Gillette, 95 Cal. 317; Wood v. Currey, 57 Cal. 209; Citizens' Bank v. Fromholz, 64 Neb. 284; Smith's Cash Store v. First Nat. Bank, 84 Pac. (Cal.) 663. The drawer of a check dated Sept. 17, 1891, payable ninety days after date has the entire day of Dec. 16 to pay it, and the statute of limitations does not begin to run thereon until the next day. Jacque v. McRae, 142 Mich. 370.

46 Haynes v. Wesley, 112 Ga. 668.

47 Ibid.

48 See Chap. XXX. §20.

49 George v. Wallace, 135 Fed. 286, 291; Petri v. National Bank, 142 U. S. 644. See Chap. XXX. § 20 for the further consideration of this topic.

CHAPTER XXVIII.

ATTACHMENT.

<ul style="list-style-type: none">1. A state, but not a national bank can be attached.2. Attachment of bank stock.3. A creditor can attach his debtor's deposit.4. Person making deposit is not important.5. Attachment of certified check.6. Attachment of uncollected check, or one credited as cash to depositor.7. Attachment of public fund deposited in official's name for his debt.8. Attachment of bonds, and other securities in safety vault.9. Attachment of collaterals.10. Attachment of deposit after general assignment.11. Creditor's lien is secured though depositor has given an unrepresented check therefor.<ul style="list-style-type: none">a. Except where assignment rule prevails.b. Assignee of deposit may be garnished.	<ul style="list-style-type: none">c. Deposit equitably assigned cannot be garnished.d. Or deposit for payment of a particular check.e. Effect of neglect to make entry of payment of check.12. For what sum a bank is liable.13. Mode of service on bank.14. Debtor must be correctly named.15. Bank should hold deposit until suit is determined.16. Interpleader.17. To obtain a lien the debtor must be owner of deposit, check, etc.18. National bank may be garnished.19. And money paid to bank for property, not corresponding with that purchased, may be recovered.20. Attachment of property taken by receiver in another state.21. A bank in liquidation may be garnished.
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1. A State, but Not a National Bank, Can be Attached.

A state bank may be attached like any other corporation;¹ but a national bank cannot be before final judgment.² Nor can

¹ Union Bank v. U. S. Bank, 4 Humph. (Tenn.) 369; Bank of U. S. v. Merchants' Bank, 1 Rob. (Va.) 573.

² Van Reed v. People's Nat. Bank, 173 N. Y. 314, affg. 67 N. Y. App. Div. 75, reviewing many cases, affd. 198 U. S. 554; Meyer v. First Nat. Bank, 77 Pac. (Idaho) 334; Merchants' Laclede Nat. Bank v. Troy Grocery Co., 39 So. (Ala.) 476. See Chap. XXIX. §10, note 98, for more

a debt due to a national bank be attached, for this in effect would be an attachment of its property.³ The declared insolvency of a bank within a short period of the attachment, in many states, works a dissolution of the process; the attachment of a solvent bank has rarely given rise to questioning, because it is able to satisfy all just judgments or other obligations. Most of the controversies, therefore, of this nature, to which the bank is a party, are to secure funds of which it is custodian and in which usually it has no real interest.

2. Attachment of Bank Stock.

Different principles, as we may have seen,⁴ apply to the attachment of stock in banking institutions for the indebtedness of their owners.⁵ As shares of corporate stock were incapable by the common law of manual seizure, they could not be attached; but this rule has been supplanted by a statute, for their attachment does not affect the power and efficiency of the bank itself.⁶ But the shares of a non-resident in a foreign

cases. Jurisdiction cannot be conferred even by counsel of the parties, and the want of it cannot be waived by any adjudications. In either case the judgment of the court would be a nullity and the attachment set aside and declared void." Ibid, citing Rosenheim Real Estate Co. v. Southern Nat. Bank, 46 S. W. (Tenn. Ch. App.) 1026; Garner v. National Bank, 66 Fed. 369.

3 Safford v. First Nat. Bank, 61 Vt. 373.

4 Chap. IV. §§15c, 41.

5 A married woman, who was a stockholder in a national bank, transferred her stock to her husband to enable him to qualify as a director. It was to be re-transferred immediately after his election. Although the agreement was improper, the stock was really hers and could not be attached by his creditors. Citizens' Nat. Bank v. Sturgis Nat. Bank, 81 S. W. (Tex. Civ. App.) 550. A bank that has a lien by statute on the stock of a stockholder cannot be displaced by a subsequent levy of attachment. Springfield Wagon Co. v. Bank of Batesville, 68 Ark. 234; Oliphint v. Bank of Commerce, 60 Ark. 198. For priority as between unrecorded transfers of shares and attaching creditors, see 30 Am. Law Rev. 223-240.

6 Lipscomb v. Condon, 56 Wl. Va. 416; Oldacre v. Butler, 116 Ala. 652; Winter v. Baldwin, 89 Ala. 483; Braden's Estate, 165 Pa. 184. This cannot be done in a state which prohibits a levy on the state member. Sowles v. National Union Bank, 82 Fed. 139. A debtor A and his creditor both live in the same state, while debtor B, of debtor A, lives in another state.

corporation cannot be attached by a creditor in another state where the stock may happen to be. Thus a citizen of Massachusetts cannot attach the stock of a citizen of California which may happen to be in possession of a bank in Boston.⁷

No rule prevents the garnishing of a stock subscription due and payable to a bank by one of its creditors.⁸

3. A Creditor Can Attach His Debtor's Deposit.

A depositor's creditor can acquire a lien to his deposit by attachment or garnishment. The bank must respect the process, and can neither apply the fund attached to the payment of any debt from the depositor to itself, or to any one else.⁹ Nor is his condition, whether insolvent or otherwise, at the time of

Debtor B may be garnished by the creditor of debtor A. *Gilman v. Ketcham*, 84 Wis. 60. The real, and not the apparent interest of a stockholder is subject to attachment. *Farmers' & Merch. Nat. Bank v. Mosher*, 63 Neb. 130. See Chap. IV. §41.

⁷ *Pinney v. Nevills*, 86 Fed. 97; *Plympton v. Bigelow*, 93 N. Y. 592; *Ireland v. Globe Milling Co.*, 19 R. I. 180; *Winslow v. Fletcher*, 53 Conn. 390; *Smith v. Downey*, 8 Ind. App. 179; *Armour Bros. Bkg. Co. v. Smith*, 113 Mo. 12. In attaching the stock of a non-resident who is not served the only lien created is by virtue of the seizure of the property. *Owens v. Atlanta Trust & Bkg. Co.*, 119 Ga. 924.

⁸ *Bohrer v. Adair*, 61 Neb. 824.

⁹ *Nicholson v. Crook*, 56 Md. 55; *Mayer v. Chattahoochee Nat. Bank*, 51 Ga. 325; *Nichols v. Goodheart*, 5 Ill. App. 574; *Ham v. Peery*, 39 Ill. App. 341; *Clapp v. Hancock Bank*, 1 Allen (Mass.) 394; *Farmers' & Mech. Nat. Bank v. Ryan*, 64 Pa. 236; *Farmers' & Mech. Bank v. King*, 57 Pa. 202; *Nichols v. Schofield*, 2 R. I. 123. A presented a village order and asked for a loan. He endorsed it and put it on the bank counter inside the screen. While the cashier was counting out the money an officer presented a garnishee process and directed the cashier to "stop payment; I have some papers." The cashier stepped to the door to receive them, while A took the order from the counter and departed. It was held that the title thereto had not passed to the bank and it was not liable as garnishee. *Gleason v. South Milwaukee Nat. Bank*, 89 Wis. 534. One who with his wife's knowledge and consent mingles his own fund with hers in a bank with the understanding that the entire fund shall be treated as his, renders the entire fund subject to garnishment for his debt. *McIntyre v. Farmers' & Merch. Bank*, 115 Mich. 255. The situs of the bank's debt for the purpose of garnishment is the bank's place of business. *McBee v. Purcell Nat. Bank*, 1 Indian Terr. 288.

the attachment of any concern to the bank.¹⁰ Whenever, therefore, the institution is liable to the depositor, his creditor can acquire a lien on his deposit by attaching it. This is the true test of the bank's liability to an attaching creditor.¹¹ Furthermore, having once acquired a lien, by no device of the debtor or bank can it be destroyed or impaired.¹²

Though the delivery of a check by a debtor A to his creditor B is not payment of his debt until it is paid, as between the creditor and his debtors, the delivery of the check to B is so effective in the way of payment that A cannot be garnished for the debt.¹³

4. Person Making Deposit is Not Important.

As the person who makes the deposit is usually not important, a deposit made by one for the benefit of another can be attached by a creditor of the depositor.¹⁴ For the same reason the source of the money is not important, if at the time of making the deposit it belonged to the depositor. Borrowed money therefore can be attached like any other.¹⁵

5. Attachment of Certified Check.

Can the holder of a certified check justly claim priority over an attaching creditor who has sued the drawee when the amount has been charged up against the depositor?¹⁶ So the Superior Court of New York once decided, but its decision was reversed by the final court of review.¹⁷ It is true that the

¹⁰ Penrose v. Erie Canal Co., 3 Phila. 198.

¹¹ Jackson v. Bank of United States, 10 Pa. 61; National Com. Bank v. Miller, 77 Ala. 168; 2 Shinn on Attachment, §§579, 582, p. 968.

¹² National Com. Bank v. Miller, 77 Ala. 168.

¹³ National Park Bank v. Levy, 17 R. I. 746, and cases cited.

¹⁴ Exchange Bank v. Gulick, 24 Kan. 359. See Greenleaf v. Mumford, 50 Barb. (N. Y.) 543.

¹⁵ Fuller v. Randall, 1 Gray (Mass.) 608.

¹⁶ Bills v. National Park Bank, 47 N. Y. Superior 302.

¹⁷ 89 N. Y. 343, 349. The court based its decision on the following reasoning: "The bank was indebted to the [depositor] when it certified the check. That certification did not absolutely pay and discharge the deposit account. It did so only *sub modo*, in the same way that a debt is paid by

check in controversy was certified at the request of the depositor's agent, and was still in his possession at the time of making the attachment. Without question the certifying of a drawer's check payable to himself or bearer, which does not operate to transfer his fund from his own account, has no such effect.¹⁸

6. Attachment of Uncollected Check, or One Credited as Cash to Depositor.

While a deposit belonging to the depositor is subject to attachment, a check, draft, note or other instrument deposited by him that has not been collected, nor credited as cash with the right to draw against it, cannot be attached.¹⁹ As the depositor himself would have no claim against the bank until its collection, surely no creditor of his would have a superior claim.²⁰ For the same reason a creditor could not attach a check drawn on the same bank,²¹ or on another²² for which credit had not been given to the depositor. A different rule, however, applies to a check that has been certified, for this is essentially money and may be attached by the depositor's creditor.²³ Nor can a bank that has drawn its draft on another bank, for which it has been paid, be attached by a creditor of

the promissory note of the debtor. Notwithstanding the certified check the depositor could have returned it, and sued upon the original account." Suppose the certified check had passed bona fide into another's possession, surely he could have held the bank for the amount.

18 Gibson v. National Park Bank, 98 N. Y. 87. See Greenleaf v. Mumford, 50 Barb. (N. Y.) 543.

19 Moors v. Goddard, 147 Mass. 287; Hancock v. Colyer, 99 Mass. 187, and 103 Mass. 396; National Com. Bank v. Miller, 77 Ala. 168. See Lane v. Felt, 7 Gray (Mass.) 491.

20 Ibid.

21 Ibid.

22 Ibid.

23 Ibid. A garnishee received a check from a debtor payable to, and endorsed by him with the request to inquire if it was good. In response to his inquiry of the bank, it sent a draft to the garnishee payable to the debtor. While it was in his possession he was garnished; and judgment was rendered against him. This was held to be proper. Weaver v. Irons, 129 Mich. 368.

the purchaser as having his money. The drawer or seller is not indebted to the buyer, for between them the transaction is ended.²⁴ Nor can a bank be garnished for a fixed deposit retained by agreement to cover drafts that are credited to the depositor at the time of depositing them, but which are returned to the bank uncollected before trial of the proceeding against the depositor.²⁵

Again, a bank that cashes drafts accompanied by bills of lading becomes the owner of the several instruments and goods covered by them, which cannot be attached by any creditor of the drawer.²⁶ The bank thereby acquires a special property in the goods of which it cannot be divested save by acceptance and payment of the draft.²⁷

7. Attachment of Public Fund Deposited in Official's Name for His Debt.

A deposit of a public fund in the officer's individual name may be garnished and taken for his debt, no proof appearing of its public character. To justify the bank in paying the money to the attaching creditor, it must act honestly and without knowledge of its true ownership. When thus acting its course is safe from attack by the depositor, his successor, or any other interested party.²⁸

But some tribunals have gone further and held that as an illegal deposit cannot be recognized, for example, a public deposit by an officer in his individual name, therefore a bank that is garnished by one of his creditors must pay the deposit

24 Capital City Bank v. Parent, 134 N. Y. 527.

25 Rice v. Third Nat. Bank, 97 Mich. 414.

26 American Trust & Sav. Bank v. Austen, 55 N. Y. Sup. 561, Supreme Ct. Special Term.

27 First Nat. Bank v. Crocker, 111 Mass. 163; First Nat. Bank v. Dearborn, 115 Mass. 219; Stollenwerck v. Thatcher, 115 Mass. 224; Petit v. First Nat. Bank, 4 Bush (Ky.) 334; Holmes v. German Security Bank, 87 Pa. 525; Davenport Nat. Bank v. Homeyer, 45 Mo. 145; First Nat. Bank v. Kelley, 57 N. Y. 34; Bank of Rochester v. Jones, 4 N. Y. 497; Cayuga Co. Nat. Bank v. Daniels, 47 N. Y. 631; Ill. Central R. v. Southern Bank, 41 Ill. App. 287.

28 Long v. Emsley, 57 Iowa 11.

to him in response to the process.²⁹ This rule is based on the broader principle, that an illegal contract cannot be recognized as the proper foundation of an action.³⁰ In other words, if public money is illegally deposited, though the depositor cannot acquire any valid right thereto, yet the true owner cannot sustain an action to recover it. The action must be against the officer or his bondsmen. The courts have grown wiser, and no longer reason in this manner. The true owner can recover from the bank on the doctrine of implied contract; that one has a right to recover his own from the wrongful possessor. The judicial mind is no longer obscured by the painful presence of an illegal contract; it is ignored and a recovery is enforced on the simplest principle of justice.

Again, a public deposit of a city made for a special purpose, for example to pay interest on bonds, cannot be attached by a general creditor of the city.³¹

8. Attachment of Bonds, and Other Securities in Safety Vault.

Money and other securities stored in the vaults of safety deposit companies cannot be taken, save by special statute, because they are not debts in any sense due from these institutions. They are purely bailees or keepers.³²

9. Attachment of Collaterals.

Collateral securities held by a bank as security for a loan may be attached subject to its rights, and after the proper sale of them, should a surplus remain, this may be taken by the

29 First Nat. Bank v. Gandy, 11 Neb. 431.

30 State v. Keim, 8 Neb. 63. This principle has been applied in a long series of cases to defeat manifest justice, which to-day would be decided in the contrary manner.

31 Hurd v. Farmers' Loan & Trust Co., 63 How. Pr. (N. Y.) 314.

32 Gregg v. Hilson, 8 Phila. 91. See Bottom v. Clarke, 7 Cush. (Mass.) 487; Hooper v. Day, 19 Me. 56; 2 Shinn on Attachment, §583, p. 973. A Vermont statute §1306 provides that negotiable paper may be garnished before notice of transfer, but that such paper actually transferred before due to a bank located in the State shall be exempt from attachment, thus leaving paper transferred to a bank without the state governed by the general provision. Hawley v. Hurd, 72 Vt. 122.

attaching creditor.³³ But the bank's rights are paramount. A bank therefore that discounts a draft secured by a bill of lading acquires a title to the merchandise therein described, which is superior to that of any attaching creditor of the shipper.³⁴

10. Attachment of Deposit After General Assignment.

A deposit that has been assigned in the general assignment of the owner cannot be garnished by one of his creditors. And this rule will be applied, although the assignee had given no notice of his ownership.³⁵

11. Creditor's Lien is Secured, Though Depositor Has Given an Unpresented Check Therefor.

(a.) In like manner a lien is secured by a creditor of the depositor, though he may have previously checked out a part or all, provided the checks have not been presented for payment³⁶ and accepted,³⁷ save in those states which maintain the assignment rule.³⁸

It will be seen that an unscrupulous depositor can, wherever

33 Warner v. Fourth Nat. Bank, 115 N. Y. 251.

34 Sabel v. Planters' Nat. Bank, 110 Ky. 299; Temple Nat. Bank v. Louisville Cotton Oil Co., 82 S. W. (Ky.) 253.

35 Hendrickson v. Trenton Nat. Bank, 81 Mo. App. 332.

36 Chap. XXVII. §§4, 5. Harry v. Wood, 2 Miles (Pa.) 327; Kuhn v. Warren Sav. Bank, 7 Sad. (Pa.) 432; Love v. Ardmore Stock Exchange, 5 Indian Terr. 202; Commercial Bank v. Chilberg, 14 Wash. 247; McIntyre v. Farmers' & Merch. Bank, 115 Mich. 255; Duncan v. Berlin, 60 N. Y. 151; Gibson v. National Park Bank, 98 N. Y. 87, 95; Imboden v. Perrie, 13 Lea (Tenn.) 504.

37 Young v. Bank, 97 Mo. App. 576, and cases cited. A depositor agreed with his debtor to issue his check payable to a named bank which was informed by telegraph by the drawee that the check was good for the amount and about \$30 more. The depositor then drew a second check for his balance, which he gave to his creditor. The transaction was regarded as an equitable assignment and therefore good against an attaching creditor of the depositor. N. Y. Life Ins. Co. v. Patterson, 35 Tex. Civ. App. 447. See Chap. XXVII. §4.

38 National Bank v. Indiana Bkg. Co., 114 Ill. 483; Reeve v. Smith, 113 Ill. 47; Harrington v. First Nat. Bank, 85 Ill. App. 212; Pease v. Landauer, 63 Wis. 20. But this rule no longer prevails in the latter state since the adoption of the Neg. Inst. Act. See also Mayer v. Chattahoochee Nat. Bank, 51 Ga. 325. The same rule has been laid down in Kentucky, Winchester Bank v. Clark Co. Nat. Bank, 21 Ky. L. Rep. 311, and in Texas,

the assignment doctrine prevails, easily defeat an attaching creditor by giving checks with a previous date after his deposit has been attached.³⁹ Checkholders can always be found who are willing to assist the makers in perpetrating the fraud. This is one of the felicities of the assignment rule.

(b.) Wherever the assignment rule prevails, the holder of a check may be sued and the amount garnished as though it had been actually transferred by the bank to his credit.⁴⁰ As he is the equitable owner he, and not the maker of the check, can be required to respond to the demand of his creditor.⁴¹

(c.) Wherever the doctrine of equitable assignment prevails, as the depositor parts with his entire interest, the transferee holds the deposit against the depositor's attaching creditors, even though the transferee had not previously presented his check and demanded payment.⁴² And if the factorized bank acknowledges indebtedness to the depositor and pays over the deposit to his attaching creditor, it is still liable to any other person to whom the depositor may have assigned his deposit with the bank's knowledge before the beginning of the attachment proceedings.⁴³ But if an order is given for a part of a particular fund, the drawee is not bound until acceptance of the order.⁴⁴

(d.) One other exception may be noted. A deposit that is made especially for the payment of a particular check, note, or other instrument, cannot be taken by attachment from the person for whose benefit the deposit was made.⁴⁵

Neely v. Grayson Co. Nat. Bank, 25 Tex. Civ. App. 513. But since the overthrow of the assignment doctrine in these states, this rule also falls.

39 See Zane's criticism in text and notes, *Banks and Banking*, §147.

40 *Deatheridge v. Crumbaugh*, 8 Ky. L. Rep. 592; *Rosenbaum v. Lytle*, 8 Ky. L. Rep. 607; *Pease v. Landauer*, 63 Wis. 20.

41 *Ibid.*

42 *Hemphill v. Yerkes*, 132 Pa. 545; *Harlow v. Bartlett*, 96 Me. 294; *Merchants & Miners' Nat. Bank*, 18 Mont. 335.

43 *Merchants & Miners' Nat. Bank v. Barnes*, 18 Mont. 335; *St. Johns v. Charles*, 105 Mass. 262.

44 *Wilson v. Carson*, 2 Md. 54.

45 *Mayer v. Chattahoochee Nat. Bank*, 51 Ga. 325; *Hurd v. Farmers' Loan & Trust Co.*, 63 How. Pr. (N. Y.) 314; *Wood v. Edgar*, 13 Mo. 451.

(e.) Lastly, neglect to enter the payment of a check, previous to the attachment of the deposit thus withdrawn, does not affect the rule.⁴⁶

12. For What Sum a Bank is Liable.

A bank is liable for the amount of the deposit existing at the time of making the attachment,⁴⁷ and in some states, notably in Maryland, any additional deposits made before trial and judgment are also included.⁴⁸ But this is not the end of a bank's liability. If, at the time of serving the garnishee process, it knows that the fund garnished belongs to the debtor, though standing in the name of another person, the institution is liable.⁴⁹

13. Mode of Service on Bank.

Service of garnishment on the cashier⁵⁰ or president⁵¹ is sufficient, but the latter is the proper person to answer the proceeding.⁵² Furthermore, a bank that is defectively garnished and pays out the deposit immediately afterward is not estopped, after a subsequent service, from showing the exact condition of things at the time of the defective service.⁵³

14. Debtor Must be Correctly Named.

The debtor must be correctly named, and if there be such an error as to lead the bank astray, it is not responsible. Thus,

46 Foster v. Swasey, 3 Woodb. & M. (U. S.) 364.

47 National Com. Bank v. Miller, 77 Ala. 168; Warfield v. Campbell, 38 Ala. 527; Bullard v. Randall, 1 Gray (Mass.) 605; Dore v. Dawson, 6 Ala. 712; Johnson v. Brant, 38 Kan. 754. See Baker v. Moody, 1 Ala. 315, and cases in §3, note 9.

48 Nicholson v. Crook, 56 Md. 55; First Nat. Bank v. Jaggers, 31 Md. 38; Farmers' & Merch. Bank v. Franklin Bank, 31 Md. 404.

49 Ferry v. Home Sav. Bank, 114 Mich. 321; Connor v. Third Nat. Bank, 90 Mich. 328; Bills v. National Park Bank, 89 N. Y. 343; Gibson v. National Park Bank, 98 N. Y. 87.

50 Rosenburg v. First Nat. Bank, (Tex. Civ. App.) 27 S. W. 897; Third Nat. Bank v. McCullough, 108 Ga. 249. And also on a clerk in the absence of his absconding principal. Nolte v. Von Gassy, 15 Ill. App. 230.

51 Sturgas v. Rogers, 26 Ind. 1.

52 Ibid.

53 Dunn v. Detroit Sav. Bank, 118 Mich. 547.

a bank had a depositor, W. G. M., while the process described one as W. J. M. As the bank did not know that W. G. M. was intended, it was not responsible for paying the money to him after the process was served.⁵⁴ In like manner process served against S. S. will not hold against S. F. S., the real depositor, so long as the bank does not know that S. F. S. is intended.⁵⁵

15. Bank Should Hold Deposit Until Suit is Determined.

After the service of an attachment the bank should await the determination of the proceeding usually before paying to any one the deposit.⁵⁶ In no case is a bank justified in paying it to the attaching creditor after notification by a non-depositor of his ownership.⁵⁷ By statutory requirement generally the bank must disclose the names and residence of the claimants, so that all may have an opportunity to test the superiority of their respective rights.⁵⁸ And should a bank fail to aver notice by a claimant, in its answer and subsequently pay the money into court, this would not be an effective defense to an action by the claimant.⁵⁹

16. Interpleader.

The bank itself may have a lien on the deposit for advances;

54 German Nat. Bank v. National State Bank, 3 Col. App. 17 and 5 Colo. App. 427.

55 Terry v. Sisson, 125 Mass. 560.

56 Schram v. Cartwright, 16 Pa. Co. Ct. 618. Where the bank garnishee in its answer clearly shows that the depositor had acquired the fund in such a way that it is not subject to the payment of his debts, the burden of proof is on the plaintiff to prove the contrary. Smith v. Merchants & Planters' Nat. Bank, 40 S. W. (Tex. Civ. App.) 1038.

57 Adams Co. v. National Shoe & Leather Bank, 44 Hun (N. Y.) 629.

58 Rock Island Lumber Co. v. Fourth Nat. Bank, 63 Kan. 768; John R. Davis Lumber Co. v. First Nat. Bank, 87 Wis. 435.

59 Bessemer Sav. Bank v. Anderson, 134 Ala. 343; Rock Island Lumber Co. v. Fourth Nat. Bank, 63 Kan. 768. A garnishee should appeal from an erroneous judgment against him as acceptor of a draft or order rendered in a proceeding against the drawer, as he would remain liable to an endorsee if he paid the judgment. Com. State Bank v. Rowley, 2 Neb. (Unoff.) 645; Montague v. Myers, 11 Heisk. (Tenn.) 539; 2 Wade on Attachment, §§458, 481.

other parties may sue and attach; thus several claimants may appear. The usual mode of settling them is by an action of interpleader.⁶⁰ And as the depositor has a *prima facie* title thereto, an adverse claimant must show a clear title before his right will be judicially declared.⁶¹

To obtain a lien by this process the depositor must be the true owner. If, therefore, he is not the owner the lien will not hold. In the larger number of controverted attachment cases this question arises, was the depositor the owner of the deposit attached?⁶² A man may be the owner of borrowed money.

17. To Obtain a Lien the Debtor Must be Owner of Deposit, Check, Etc.

Manifestly, the deposit of a principal cannot be taken by his agent debtor, regardless of the form of the deposit.⁶³ It is true that *prima facie* the name in which a deposit stands is the true name,⁶⁴ but the truth may always be shown. For the same reason should a principal's deposit be put in his agent's name, either by mistake, or by design to conceal its true ownership, it can be attached by the principal's creditor.⁶⁵ This legal thread runs through all the cases to which a lien can be fastened for the benefit of the creditor of the real owner; on the other hand, one's deposit cannot be taken from him to respond to another's indebtedness, simply because it happens to

60 Pratt v. Myers, 18 N. Y. Supp. 466; Livingstone v. Bank of Montreal, 50 Ill. App. 562. See Chaps. XX. §45, XXI. §18.

61 Detroit Sav. Bank v. Haines, 128 Mich. 38.

62 *Ibid.*

63 Morrill v. Raymond, 28 Kan. 415; Cohen v. St. Louis Perpetual Ins. Co., 11 Mo. 374; Gregg v. Farmers & Merchants' Bank, 80 Mo. 251; Simmons v. Almy, 100 Mass. 239; Raynes v. Lowell Irish Benev. Society, 4 Cush. (Mass.) 343; Randall v. Way, 111 Mass. 506; Hemphill v. Yerkes, 132 Pa. 545; Farmers' & Mech. Bank v. King, 57 Pa. 202; Bank v. Jones, 42 Pa. 536; Proctor v. Greene, 14 R. I. 42; First Nat. Bank v. Mason, 95 Pa. 113; Des Moines Cotton Mill Co. v. Cooper, 93 Iowa 654. See Ingersoll v. First Nat. Bank, 10 Minn. 396.

64 Bessemer Sav. Bank v. Anderson, 134 Ala. 343; Detroit Sav. Bank v. Haines, 128 Mich. 38. *Prima facie* a deposit made by one and drawn out on his name is his. Boatmen's Sav. Bank v. Overall, 16 Mo. App. 510

65 Raynes v. Lowell Irish Benevolent Society, 4 Cush. (Mass.) 343.

be in his name unless he is guilty of some wrong in thus parting with control.

Thus a deposit in the name of "A in trust for" a society that is mentioned may be attached by its creditors. Again, money belonging to a wife, though deposited in the husband's name, cannot be taken for his debt. In one of the recent cases involving this question the court declared that if the deposit really belonged to her, the fact that her husband, to whom she intrusted it, deposited it to his own credit, did not change her title thereto.⁶⁶ But in another, in which their deposits were mingled with the understanding that the entire fund should be treated as the husband's, his creditor took all.⁶⁷ So the deposit of an award may be reached in a suit against him in whose favor it has been made.⁶⁸

Nor is the force of this rule impaired by holding that a deposit made by a person as "agent," without disclosing the name of any principal, belongs to the depositor and may be taken by his creditor.⁶⁹ The additional term creates the presumption that the deposit belongs to some one else, though the word may be added to protect it from attachment. Thousands of deposits are made in banks by persons as "trustee," which belong to the depositors, and are thus made to overcome some regulation limiting the amount of one's deposit, to escape taxation, or other cause. This class of cases turns on the same question as the other agency cases, to whom in fact did the deposit belong. If it was the depositor's, it can be taken for his debt; if it belonged to another, it cannot be thus taken.

Of course, if the deposit that is wrongfully attached is a trust fund it must be properly traced and identified in accordance with the modern rules in order to recover it. There is no question whatever concerning the equitable owner's right of

66 *Simmons v. Almy*, 100 Mass. 239.

67 *McIntyre v. Farmers & Merchants' Bank*, 115 Mich. 255.

68 *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343.

69 *Ibid.*

recovery in such cases, but there may be difficulty in proving the existence of the deposit.⁷⁰

Again, though money is exempt by statute from attachment, pensions and the like, this applies to "the money due or to become due"; after it has been paid over and deposited in a bank "it may be attached like any other money."⁷¹

Sometimes the question has arisen whether a fund in a bank belongs to it, or to an officer. Of course, the process must be brought against the possessor or owner of the fund, and a mistake is fatal to recovery.⁷² Thus, the cashier of a bank was also treasurer of a corporation which kept a deposit in the bank. The process was brought against the cashier, but failed, for the deposit had been made with the bank.⁷³

18. National Bank May be Garnished.

A national bank may be garnished, for this does not touch its property; nor is the right thus acquired lost by the bank's suspension of business and the appointment of a receiver.⁷⁴ But a state court cannot enforce the lien after his appointment; the controller of the currency, however, must recognize it.⁷⁵

19. And Money Paid to Bank for Property, Not Corresponding With That Purchased, May be Recovered.

While the security of a national bank from attachment before final judgment in an action is absolute, this does not preclude an action for the recovery of money paid for the pur-

⁷⁰ Proctor v. Greene, 14 R. I. 42; Twohy Mercantile Co. v. Melby, 83 Minn. 394.

⁷¹ Spelman v. Aldrich, 126 Mass. 113; Cavanaugh v. Smith, 84 Ind. 380; Fourte v. Carr, 108 Ind. 123; Jardain v. Fairton Sav. Fund Assn., 44 N. J. Law 376; Cranz v. White, 27 Kan. 319; Friend v. Garcelon, 77 Me. 25; Rozelle v. Rhodes, 116 Pa. 129.

⁷² Lewis v. Smith, 2 Cranch. C. C. 571.

⁷³ Sprague v. Steam Nav. Co., 52 Me. 592.

⁷⁴ Earle v. Pennsylvania, 178 U. S. 449; Earle v. Conway, 178 U. S. 456; Commonwealth v. Chestnut St. Nat. Bank, 189 Pa. 606; Corn Ex. Bank v. Blye, 101 N. Y. 303.

⁷⁵ Earle v. Pennsylvania, 178 U. S. 449.

chase of property which is never delivered, or is not in accordance with the contract. Thus, a bank buys or credits a draft of the drawer secured by merchandise which is purchased by an assignee supposing that the collateral security will be forthcoming. If it is not delivered, or is lacking in quantity and quality, the bank is liable therefor.⁷⁶ This rule may seem to impose a somewhat impracticable duty on the bank, nevertheless the courts declare that "the diligence required of banks in their efforts to protect themselves for moneys advanced to their customers should extend to an inquiry as to the value of the articles upon which they make such advances."⁷⁷ That such a proceeding to recover the money is an attachment within the federal statute is judicially denied. This is no attachment against a national bank in any proper legal view. The national bank is a mere claimant of the fund; intervening as such claimant, and preferring its claim. It is a misconception to say that the national bank is in this proceeding attached within the meaning of the United States statute.⁷⁸

20. Attachment of Property Taken by Receiver in Another State.

By comity a receiver who takes property belonging to the bank in another state and transfers it into his own, can hold it like any other property of the bank for the use of its creditors.⁷⁹ No particular creditor can deprive him of it by attachment.⁸⁰ Even though he should afterward have it in his possession within the state where it was first obtained, it can not be taken from him by any creditor who might be living within that jurisdiction.⁸¹

76 Searles v. Smith Grain Co., 80 Miss. 188.

77 Landa v. Lattin, 19 Tex. Civ. App. 246, 253.

78 The above cases and Columbian Nat. Bank v. White, 65 Mo. App. 677; Miller v. American Nat. Bank, 76 Miss. 84; Finch v. Gregg, 126 N. C. 176, and cases cited. See note 49 L. R. A. 679.

79 Woodhull v. Farmers' Trust Co., 11 N. Dak. 157; Chicago & St. Paul R. v. Keokuk Packet Co., 108 Ill. 317; Pond v. Cooke, 45 Conn. 126; Cagill v. Wooldridge, 8 Bax. (Tenn.) 580; Humphreys v. Hopkins, 81 Cal. 551.

80 Ibid.

81 Chicago & St. Paul R. v. Keokuk Packet Co., 108 Ill. 317.

21. A Bank in Liquidation May be Garnished.

A bank, even in liquidation, may be garnished. Though the deposit sought to be held by the process cannot be paid in full, this is no reason why the depositor's creditor should not ultimately take the dividend.⁸² And if the depositor at that time was indebted to the bank on an unmatured note, the garnishing creditor by his process in some states gains a preference over the bank;⁸³ in others, the bank is not bound to answer the process.⁸⁴

82 Birmingham Nat. Bank v. Mayer, 104 Ala. 634.

83 Ibid.

84 Schuyler v. Israel, 120 U. S. 506.

CHAPTER XXIX.

DISSOLUTION AND ITS EFFECT.

<ul style="list-style-type: none">1. Modes of dissolving a bank.2. Bank is not dissolved by insolvency.3. When is bank insolvent?<ul style="list-style-type: none">a. And in contemplation of insolvency.b. Borrowing.c. Temporary inability to pay is not insolvency.d. Inability to pay its circulating notes.4. How assignment may be made.5. Validity of assignment may be questioned.6. What is included in the assets.<ul style="list-style-type: none">a. Property belonging to another in the bank's possession is not included.b. A preference, contrary to law, is excluded.<ul style="list-style-type: none">bi. To be a preference the transfer must be to a creditor.b2. To be a preference the transfer must be intended.b3. When a preference by the national law is presumed.	<ul style="list-style-type: none">b4. Forbidden preferences.b5. How is the transaction affected by knowledge of the bank's insolvency.b6. A transfer in contemplation of insolvency is governed by same rule.b7. A transfer not in the ordinary course of business is a preference.b8. Transfers or payments to bank's officers.c. When preferences are allowed, what are legal and not included in assets.d. Care and return of preferred property.7. Bank is not dissolved by assignment.8. Suspension of authority of officers.9. Authority of bank pending receiver's appointment.10. How attachments are affected.11. Right of a creditor in another state.12. Transfer of stock.
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1. Modes of Dissolving a Bank.

A corporate bank may be dissolved by the expiration or repeal of its charter; by its forfeiture through judicial action; by the voluntary action of its members; by their death without providing for their succession; and by consolidation.¹

¹ See 3 Ga. Encyc. 620; Gibson v. Thornton, 107 Ga. 545.

2. Bank is Not Dissolved by Insolvency.

A bank is not dissolved by insolvency and assignment of its franchise and property to an assignee or receiver.² But this act is usually followed by its dissolution; this is the most common method, and has given birth to the largest number of questions. So it will be first considered.

3. When is a Bank Insolvent?

A bank is insolvent that cannot meet its liabilities as they become due in the ordinary course of business. By the national banking law an "act of insolvency" is the closing of the bank doors, refusal to pay the depositors on demand, refusal to transact the ordinary business of the bank and discharge its liabilities to its creditors.³

(a.) A bank is in contemplation of insolvency when from its circumstances it must be reasonably apparent to its officers that it is unable to meet its obligations and will soon be obliged to suspend its operations.⁴

(b.) The need of money, which is met by borrowing, is not such a warning or notice of insolvency as to deprive the bank of the capacity to borrow, or to invalidate a loan if made⁵ even by a director.⁶ The condition of things that will

² Bank of Bethel v. Pahquique Bank, 14 Wall. 383. See §7.

³ Irons v. Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301, 306; Atwater v. American Ex. Nat. Bank, 152 Ill. 605; State v. Darrah, 152 Mo. 522. Though produced by a financial panic, it does not justify the bank in receiving deposits when it is in a failing condition. *Ibid.* "A corporation, like an individual, is insolvent when it is not able to pay its debts. Insolvency means a general inability to answer in the course of business the liabilities existing and capable of being enforced." Allen, J., *Brouwer v. Harbeck*, 9 N. Y. 589, 594, citing *Cutten v. Sanger*, 2 Young & Jer. (Eng.) 459.

⁴ Roberts v. Hill, 24 Fed. 571, 573; Stapylton v. Stockton, 33 C. C. A. (U. S.) 542. "A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations." *Roberts v. Hill*, 24 Fed. 571, 573.

⁵ *Stapylton v. Stockton*, 33 C. C. A. 542; *Armstrong v. Chemical Nat. Bank*, 41 Fed. 234. See note 25 L. R. A. 548.

⁶ *Millsaps v. Chapman*, 76 Miss. 942.

justify the officers of a bank in borrowing, hoping or expecting to weather the storm, or condemn their action as an attempt to make an unlawful preference, in many cases, unless the truth is apparent, must depend on inquiry and a revelation of the intention of the bank officers. Courts, therefore, should not be harshly criticised for their diversity of judgments on such a difficult question. Thus, a far western tribunal has recently decided, somewhat contrary to the above rules, that the officers of a bank who borrow money, pledging security therefor, to gain "an extension of time," though knowing it was insolvent, created an unlawful preference.⁷

Furthermore, in determining the question of a bank's solvency, its capital and surplus are its resources.⁸

(c.) Temporary inability to command money to meet a bank's obligations does not always mean insolvency. As banks lend the larger portion of their deposits, occasions happen when they cannot immediately repay on demand. If they are wisely lent, and in due time are likely to be repaid, so that neither depositors nor stockholders will lose anything, the lending bank is not insolvent.⁹

(d.) Formerly, when state banks issued circulating notes, not infrequently they failed to pay them on presentation. By the laws of some states, this was an act of insolvency,¹⁰ but more generally this result turned on the question whether the suspension was temporary or permanent. If the failure to pay was permanent, then the bank was insolvent;¹¹ otherwise¹² the failure was regarded merely a suspension. These failures, so common and disastrous, in former days, will never happen so long as the present system is continued.

7 Burrell v. Bennett, 20 Wash. 644.

8 State v. Meyers, 54 Kan. 206.

9 Ferry v. Bank, 15 How. Pr. (N. Y.) 445. See Dodge v. Mastin, 5 McCrary, 404.

10 Lumpkin v. Jones, 1 Kelly (Ga.) 27.

11 Godfrey v. Terry, 97 U. S. 171; In re Empire City Bank, 10 How. Pr. (N. Y.) 498, and 18 N. Y. 199.

12 Livingston v. Bank, 26 Barb. (N. Y.) 304. See Lumpkin v. Jones, 1 Kelly (Ga.) 27.

4. How Assignment May be Made.

By common law a bank can make an assignment.¹³ But the statutory mode, wherever existing, must be followed.¹⁴ By the national banking law the controller of the currency, on becoming satisfied that a bank has refused to pay its circulating notes and is in default, may forthwith appoint a receiver to take care of its affairs.¹⁵

Sometimes an assignment is the act of the stockholders,¹⁶ more frequently of the directors.¹⁷ A president has not authority,¹⁸ nor would his action, though ratified by the directors, discharge a prior attachment unless the subsequent insolvency of the bank by virtue of a statute had that effect.¹⁹

5. Validity of Assignment May be Questioned.

An assignment that is fraudulent²⁰ can be attacked by a creditor and set aside. On the other hand, his right may be lost by delay,²¹ waiver or acquiescence.²²

An assignment is not invalid because it is made hurriedly to evade impending legislation,²³ nor for a reservation to the grantor of its surplus after paying specified debts.²⁴

¹³ Lenox v. Roberts, 2 Wheat. (U. S.) 373; Catlin v. Eagle Bank, 6 Conn. 233; Ringo v. Briscoe, 13 Ark. 563; Carey v. Giles, 10 Ga. 9, 29; Union Bank v. Ellicott, 6 Gill & J. (Md.) 363; Arthur v. Commercial Bank, 9 Sm. & M. (Miss.) 394.

¹⁴ Bank Commissioners v. Bank, Harris Ch. (Mich.) 106. See Grand Gulf R. & Bkg. Co. v. State, 10 Sm. & M. (Miss.) 428.

¹⁵ Rev. Stat. 5242.

¹⁶ Descombes v. Wood, 91 Mo. 196.

¹⁷ Chase v. Tuttle, 55 Conn. 455; Tripp v. Northwestern Nat. Bank, 41 Minn. 400; Hutchinson v. Green, 91 Mo. 367; Descombes v. Wood, 91 Mo. 196; Dana v. Bank, 5 Watts & S. (Pa.) 223; De Camp v. Alward, 52 Ind. 468; Union Bank v. Ellicott, 6 Gill & J. (Md.) 363; In re Miners' Bank, 13 Pa. Week Notes 370.

¹⁸ Meloy v. Central Nat. Bank, 18 D. C. 69; Hoyt v. Thompson, 5 N. Y. 320; Cupit v. Park City Bank, 20 Utah 292.

¹⁹ Ibid.

²⁰ Carey v. Giles, 10 Ga. 9. See Montgomery v. Galbraith, 11 Sm. & M. (Miss.) 555.

²¹ Descombes v. Wood, 91 Mo. 196.

²² Ibid.; Blake v. Hubbard, 45 Mich. 1, 4; Appeal of Smith, 86 Mich. 149.

²³ Dana v. Bank, 5 Watts & S. (Pa.) 223.

²⁴ Ibid.

The assignment must be attacked directly. Even though it be fraudulent, the fact cannot be shown and the assignment overthrown in a collateral proceeding.²⁵

6. What is Included in the Assets.

The assets of an insolvent bank are a trust fund for the benefit of its creditors,²⁶ and include among other property all the deposits a bank may have, in whatever state they may be, so that a creditor of the bank, living in another state where it may happen to have a deposit, or other indebtedness, cannot attach and hold it against the bank's assignee.²⁷ The reason is, the deposit is a debt having no situs and therefore follows the person of the debtor.

(a.) What other property is included by this term assets? It does not include property, in its possession, belonging to another, for example, a check or the proceeds of a check received as agent for collection. These belong to the persons for whom the bank is executing the trust, and should be delivered.²⁸ Sometimes collections of this character are completed by the bank after the appointment of an assignee or receiver, and are then paid over.²⁹

Nor do assets by the national banking law include a remittance by a debtor bank when solvent, though it ceased to be before the remittance reached its destination, provided the receiving or creditor bank had no knowledge of its debtor's insolvency at the time of receiving it.³⁰

25 Second Nat. Bank v. Schranck, 43 Minn. 38.

26 See Chap. V. §1.

27 Union Sav. Bank v. Indianapolis Lounge Co., 20 Ind. App. 325, and cases cited; Gregg v. Sloan, 76 Va. 497; Princeton Mfg. Co. v. White, 68 Ga. 96. See Burrell on Assignments, 368, 372; Caskie v. Webster, 2 Wall. Jr., (U. S.) 131; Osgood v. Maguire, 61 N. Y. 524. See §11, also Chap. XXVIII. §3.

28 See Chap. XVII. §8. An assignment does not transfer to the assignee the identical money deposited. Union Sav. Bank v. Indianapolis Lounge Co., 20 Ind. App. 325, 328.

29 See Chap. XVII. §8.

30 McDonald v. Chemical Nat. Bank, 174 U. S. 610, affg. 28 C. C. A. 584, affg. 80 Fed. 587. See Dutcher v. Importers & Traders' Nat. Bank, 59 N. Y. 5.

Funds impressed with a trust existing between the bank and the beneficiary are not included, for they do not belong to the bank. These have been already considered. They include deposits received contrary to law because of the bank's insolvency; all kinds of implied trust deposits; collections made by the bank as agent and still in its possession; and all uncollected paper, and checks in process of clearing.

(b.) By the national ³¹ and many of the state governments ³² all preferences, either by individuals or corporations, are invalid, and property of this nature that has been conveyed away by a bank can be recovered by its assignee or receiver, and added to its assets. When a bank parts with its property just before its failure, especially in the way of making payments, the transaction is often sharply scanned for the purpose of ascertaining whether it bears the stamp of a preference.

31 Rev. Stat. §5242. *National Bank v. Colby*, 21 Wall. (U. S.) 609; *Robinson v. National Bank*, 81 N. Y. 385; *National Shoe & Leather Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467, 469; *Armstrong v. Chemical Nat. Bank*, 41 Fed. 234; *Case v. Citizens' Bank*, 2 Woods (U. S.) 23; *Roberts v. Hill*, 24 Fed. 571; *National Security Bank v. Butler*, 129 U. S. 223; 2 Cook on Corp. §§691, 1630.

32 *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, affg. 43 Hun 167; *Bradner v. Woodruff*, 52 Hun 214; *Kingsley v. First Nat. Bank*, 31 Hun 329; *Brouwer v. Harbeck*, 9 N. Y. 589; *National Shoe & Leather Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; *Standard Nat. Bank v. National Silk Co.*, 30 N. Y. Misc. 219; *Hopkins & Johnson's Appeal*, 90 Pa. 69; *Frost v. Barnert*, 56 N. J. Eq. 290; *Consolidated Coal Co. v. National State Bank*, 55 N. J. Eq. 800; *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634; *First Nat. Bank v. Lumber Co.*, 91 Tenn. 12; *Farmers' & Merch. Bank v. Waco R. Co.*, 36 S. W. (Tex.) 131; *McAfee v. Bland*, 11 S. W. (Ky.) 439; *Burrell v. Bennett*, 20 Wash. 644; *May v. Tenney*, 148 U. S. 60. A conveyance by an insolvent bank to a creditor knowing that the bank is insolvent is void. *Clarke v. Ingram*, 107 Ga. 565. See this case for an able discussion of the creditor's knowledge of the bank's insolvency.

Contra.—*Larrabee v. Franklin Bank*, 114 Mo. 592; *Merced Bank v. Ivett*, 127 Cal. 134; *State Nat. Bank v. Union Nat. Bank*, 168 Ill. 519; *U. S. National Bank v. Westervelt*, 55 Neb. 424; *Warren v. First Nat. Bank*, 149 Ill. 9; *Atwater v. American Ex. Nat. Bank*, 152 Ill. 605; *Savings Bank v. Bates*, 8 Conn. 505; *Smith v. Skeary*, 47 Conn. 47; see *Catlin v. Eagle Bank*, 6 Conn. 233; *Merchants' Nat. Bank v. Newton Cotton Mills*, 115 N. C., 507; *First Nat. Bank v. Dovetail Gear Co.*, 143 Ind. 550; *First Nat. Bank*

(b, 1.) To constitute a preference the transfer must be to a creditor. The transfer of property, therefore, to an individual who has never been a creditor, for which an equivalent is received, for example, the discount of a note for a bank is not a preference, and the receiver has no claim on the note thus discounted for the benefit of creditors. The preference, as the court remarked on one occasion, must be "to an existing creditor; the act of transfer must be to one to whom the company is owing a duty, and who is unjustly preferred over others to whom it owes the same duty. The reason does not apply to one who becomes for the first time a creditor by the very act of transfer, and for which the company receives an ample consideration."³³

(b, 2.) A bank may make many payments when in a state of insolvency that are not preferences, because it is not the intention of either party to give or gain a preference over other creditors. Insolvency of a corporation, as the Supreme Court of Missouri has well said, "does not per se abrogate its power to continue the management of its assets; but that it may continue in its due course of business so long as there is a fair and honest prospect of redeeming its fortunes, and may pay off debts in regular course of business, though a part of the creditors are thereby deprived of their security."³⁴ A bank must be hopelessly insolvent and payments must also be made with an intent to prefer to create this condition.³⁵

(b, 3.) By the national banking law "an intent to give a preference is presumed when a payment is made to a creditor

v. Garretson, 107 Iowa 196; Arthur v. Commercial Bank, 17 Miss. 394; State v. Commercial Bank, 21 Miss. 569; Cupit v. Park City Bank, 20 Utah 292; American Ex. Nat. Bank v. Ward, 49 C. C. A. 611, reviewing many cases.

33 Marine Bank v. Clements, 31 N. Y. 33, 45; Curtis v. Leavitt, 15 N. Y. 9, 112, 142, 145.

34 Foster v. Mullanphy Planing Mill Co., 92 Mo. 79, 87; Larrabee v. Franklin Bank, 114 Mo. 592; Stone v. Jenison, 111 Mich. 592; McAfee v. Bland, 11 S. W. (Ky.) 439; People's Bank v. Paterson Sav. Bank, 10 N. J. Eq. 13, 17. See note, 36 L. R. A. 675.

35 McAfee v. Bland, 11 S. W. (Ky.) 439.

by a debtor who knows his own insolvency, and therefore knows that he cannot pay all his creditors in full. A preference is the natural and probable consequence under such conditions."³⁶

(b, 4.) When is a payment a forbidden preference? Knowing that failure is impending, the payment of some creditors to the exclusion of others,³⁷ likewise the transfer of property to avoid failure,³⁸ the payment of a savings bank deposit, though having by state law a priority over other deposits,³⁹ a draft drawn by the bank for which the purchaser had paid by his check on the bank,⁴⁰ a mortgage executed by an officer on his own property to secure a depositor, which is needed to pay for the assessment on his shares,⁴¹ the payment of public deposits;⁴² the extension of the notes of a debtor.⁴³ Of course, a transfer of property after the bank's failure to a creditor would be a preference.⁴⁴

36 Roberts v. Hill, 24 Fed. 571, 574.

37 Irons v. Manufacturers' Nat. Bank, 6 Biss. (U. S.) 301; National Security Bank v. Price, 22 Fed. 697. Depositors and other general creditors may be preferred over claimants whose claims grow out of transactions which the bank had no authority to undertake, for example, to buy and sell goods, in other words, keep a store. State v. Bank, 58 Neb. 818.

38 Roberts v. Hill, 24 Fed. 571.

39 Davis v. Elmira Sav. Bank, 161 U. S. 275.

40 Jewitt v. Yardley, 81 Fed. 920.

41 Gatch v. Fitch, 34 Fed. 566. The president of a bank, who was also a large debtor to the institution, conveyed land thereto to secure the depositors. The conveyance was sustained, though it operated as a preference against his own creditors. Steinke v. Yetzer, 108 Iowa 512.

42 Spokane County v. Clark, 61 Fed. 538; Multnomah County v. Oregon Nat. Bank, 61 Fed. 912.

Contra.—San Diego Co. v. California Nat. Bank, 52 Fed. 59.

43 A bank on the eve of insolvency which extends the notes of a solvent debtor for two or three years commits a fraud on its creditors. Still worse, "if the debtor is a director, and his surety is both president and director. It is impossible that such a transaction can be otherwise than a fraud on the creditors of the bank." Bank of St. Marys v. St. John, 25 Ala. 566, 621. See First Nat. Bank v. Johnston, 97 Ala. 655.

44 Venango Nat. Bank v. Taylor, 56 Pa. 14; Leavitt v. Tylee, 1 Sand. Ch. (N. Y.) 207; Gillet v. Moody, 3 N. Y. 479.

In many states,⁴⁵ though not all,⁴⁶ a preference to a bank officer is forbidden. This rule is founded on the soundest morality. As the Court of Appeals of Maryland has strongly said: "It requires but little foresight to predict that if it be announced by courts of equity that corporations insolvent, or in contemplation of insolvency, or in failing circumstances, may pay the debts of their officers as preferred creditors, neither general creditors nor stockholders will have any redress."⁴⁷

If a bank has been honestly, though unsuccessfully managed, there is no reason why the directors should be permitted to take advantage of their superior knowledge and glean enough of the remaining assets to save themselves from loss; if the bank has been unskilfully and illegally managed, the doctrine shocks the conscience that directors may escape from the wreck, taking with them whatever money there may happen to be on board the ship and keep it, forsooth, because the bank was their debtor, as though the other victims whom they

45 Lowry Bkg. Co. v. Empire Lumber Co., 91 Ga. 624; Beach v. Miller, 130 Ill. 162; Swentzel v. Penn Bank, 147 Pa. 140; First Nat. Bank v. Knowles, 67 Wis. 373; Slack v. Northwestern Nat. Bank, 103 Wis. 57; Curran v. State of Arkansas, 15 How. (U. S.) 304; City Nat. Bank v. Goshen Woolen Co., 35 Ind. App. 562, citing a very large number of authorities; Hinz v. Van Dusen, 95 Wis. 503; Bollin v. Merchants' Ex. Bank, 89 Wis. 278; Merced Bank v. Ivett, 127 Cal. 134; Bonney v. Tilley, 109 Cal. 346; Merchants' Bank v. Newton Mills, 115 N. C. 507; Lamb v. Cecil, 25 W. Va. 288; Lamb v. Pannell, 28 W. Va. 663; Tilson v. Downing, 45 Neb. 549; Hume v. Miller, 106 N. W. (Neb.) 1006; Hays v. Citizens' Bank, 51 Kan. 535. For other cases, see note 22 L. R. A. 802, 806-808, also 44 L. R. A. 802.

46 Farmers' & Merch. Bank v. Wasson, 48 Iowa 336; Buell v. Buckingham, 16 Iowa 284; Bank v. Potts Co., 90 Mich. 345; Planters' Bank v. Whittle, 78 Va. 737; Catlin v. Eagle Bank, 6 Conn. 233; Corey v. Wadsworth, 118 Ala. 488, containing an elaborate exposition of the law. For other cases see 44 L. R. A. 766 and 22 L. R. A. 802, and City Nat. Bank v. Goshen Woolen Mills Co., 35 Ind. App. 562, 575.

47 James Clark Co. v. Colton, 91 Md. 195, 213; Hopkins & Johnson's Appeal, 90 Pa. 69; Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493; Hays v. Citizens' Bank, 51 Kan. 535; Olney v. Connecticut Land Co., 16 R. I. 597; Thompson v. Huron Lumber Co., 4 Wash. 600; Adams v. Kehlor Milling Co., 35 Fed. 433.

have lured to ruin were of little or no account. In other words, if not knowing enough to manage a bank, yet knowing enough to scoop out the remains for their own benefit, directors should not be permitted to do so, leaving to the other victims nothing more than the discovery of the belated and hopeless wish perhaps that they too could have served as directors.⁴⁸ The law, however, will sustain a lien for money borrowed of an officer while the bank was in a solvent condition.⁴⁹

(b, 5.) How is a transaction affected by knowledge of the bank's insolvency by the two parties? If both knew that the bank was insolvent, then the transaction was fraudulent,⁵⁰ unless they honestly believed and expected the bank would continue the business. If the bank knew of its insolvency and the other party was innocent, by the laws of some states the transaction will be upheld,⁵¹ by others it will not be.⁵²

By the national banking law a deposit cannot be applied when the bank was insolvent, though it was still doing business and the depositor was ignorant of its insolvent condition. It is true that while the ignorance of the receiver of a payment, that the payee bank is insolvent, will not protect him in receiving and retaining the money thus paid, it is just as true that so long as a bank continues to do business a payment is not considered a preference because the bank is insolvent, for the reason that it still hopes and expects to weather the storm. A payment does not become a preference until the bank knows or believes that it must soon suspend, and is done with the intention of making a preference, or at least that the receiver is likely to have a preference. If this be the law, ought not the court in the Hall case to have gone further in

48 Ibid, especially the Colton case, 91 Md. 195, and the Rouse case, 46 Ohio St. 493; Corbett v. Woodward, 5 Saw. (U. S.) 403, 417.

49 Mullanphy Sav. Bank v. Schott, 135 Ill. 655. See note 57.

50 Burrell v. Bennett, 20 Wash. 644; Roan v. Winn, 93 Mo. 503; Leavitt v. La Force, 71 Mo. 353.

51 Hill v. Gate City Bank, 86 Ga. 284; Dutcher v. Imp. & Traders' Nat. Bank, 59 N. Y. 5, 9; Kinsela v. Cataract City Bank, 18 N. J. Eq. 158.

52 First Nat. Bank v. Hall, 119 Ala. 64; National Security Bank v. Butler, 129 U. S. 223.

its inquiry into the fact before pronouncing its decision? Not simply was the bank insolvent when applying the deposit, but did it intend to favor the receiver over other creditors, knowing or believing that the bank would soon close its doors.⁵³

(b, 6.) By the New York statute a transfer or assignment in contemplation of insolvency is inhibited as clearly as in the case of actual insolvency. The object and spirit of the act are to secure an equal distribution of a corporation's assets among its creditors.⁵⁴

Nor is a payment by a bank of a check, for example, in the ordinary course of business, though the bank is known to be insolvent by its officers, but not by the receiver of the money, a preference under the preference laws of New York, which declares a payment to be unlawful, made in contemplation of insolvency. "The act being done in the ordinary and usual course of business by the company, uninfluenced by the state of its pecuniary affairs, it cannot be said to have been done in contemplation of any particular condition of such affairs."⁵⁵

(b, 7.) A payment or other transfer made by the bank to a debtor contrary to the usual course of business, is to pay a past debt without receiving any present consideration. The act, therefore, is unlawful, without regard to the payee's innocence, intent or knowledge of the bank's insolvency.⁵⁶

(b, 8.) Of course, so far as a director or other officer has a right to deal with his corporation, he is entitled to the payment of his claims like other creditors.⁵⁷ But he cannot use

53 *First Nat. Bank v. Hall*, 119 Ala. 64; *National Security Bank v. Butler*, 129 U. S. 223.

54 Laws of 1882, R. S. 605, §1. *Robinson v. Nat. Bank*, 21 N. Y. 406; *National Shoe & Leather Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467, 469; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168. A preference by the North American Trust & Banking Co. was an exception to the general law and valid by its charter. *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309, see case on appeal, 15 N. Y. 9.

55 *Dutcher v. Imp. & Traders' Nat. Bank*, 59 N. Y. 5, 9.

56 *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, 174; *Brouwer v. Harbeck*, 9 N. Y. 589; *Lamb v. Cecil*, 25 W. Va. 288.

57 *Duncomb v. N. Y. & Northern R.*, 84 N. Y. 190; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655. See Chap. VII. §31.

his position for gaining knowledge to the disadvantage of others.⁵⁸ A director, therefore, who draws out his deposit, or exchanges his stock for land, knowing that his bank is insolvent and believing that it will soon fail must return the money.⁵⁹

Furthermore, the knowledge of the officers under various limitations, as previously explained, is the knowledge of the bank, and therefore in making payments it cannot plead ignorance in paying, nor the officer in receiving, whatever is delivered to him by the bank.⁶⁰

(c.) At common law or by statute in some states preferences made in good faith and for a consideration are sustained;⁶¹ in these the most important question is, Are they within the rule? In other words, is the preference upheld by the law? Wherever a preference is recognized, a banking corporation can prefer creditors like an individual.⁶²

Thus, in Colorado the holder of a certificate of deposit given by a bank is entitled to a preference,⁶³ but a depositor in a building association is not;⁶⁴ likewise in Alabama the holders of bank notes and depositors not receiving interest are preferred,⁶⁵ while the holders of certificates of deposit who receive interest are not thus barred.⁶⁶

(d.) When a preference is given and the property has

58 Lamb v. Pannell, 28 W. Va. 663; Lamb v. Cecil, 28 W. Va. 653; Roan v. Winn, 93 Mo. 503; Throop v. Hatch Lithographic Co., 125 N. Y. 530; Burrell v. Bennett, 20 Wash. 644; Conover v. Hull, 10 Wash. 673; Cook v. Moody, 18 Wash. 114. But see O'Brien v. East River Bridge Co., 161 N. Y. 539, revg. 36 App. Div. 17.

59 James Clark Co. v. Colton, 91 Md. 195.

60 Lowry Bkg. Co. v. Empire Lumber Co., 91 Ga. 624; James Clark Co. v. Colton, 91 Md. 195, 204.

61 State Nat. Bank v. Union Nat. Bank, 168 Ill. 519; Warren v. First National Bank, 149 Ill. 9.

62 Catlin v. Eagle Bank, 6 Conn. 233; Dana v. Bank, 5 Watts & S. (Pa.) 223.

63 Tabor v. Mullen, 86 Pac. (Colo.) 1007.

Contra.—Bayor v. Am. Trust & Sav. Bank, 157 Ill. 62.

64 Askey v. Fidelity Sav. Assn., 86 Pac. (Colo.) 1025.

65 Taylor v. Hutchinson, 40 So. (Ala.) 108.

66 Ibid.

changed its character before a demand for its reclamation, the question is not always easily answered, what can be demanded? In one of the recent cases⁶⁷ Chief Justice Start has remarked "that a creditor of an insolvent receiving property as a preference may [not] use it so as to make material gains out of it, or permit it by his negligence to become seriously depreciated in value, and then return it in its depreciated and worthless condition to the assignee in full discharge of his liability. A judgment declaring a preferential transfer void relates back to its date, so that the transferee may be charged with the value of the use of the property and for damages to it while in his possession." Thus an insolvent debtor transferred notes of a third party to a bank, which were a preference. At their maturity they were renewed by the maker. Before the maturity of the renewals, both the maker and the bank holding them had failed. The assignee of the debtor, who made the preference, claimed the value of the first notes with interest to the date of their maturity; the receiver desired to return them. The assignee's claim was sustained.⁶⁸

7. Bank is Not Dissolved by Assignment.

As the assignment does not affect the corporate franchise, consequently the bank is not dissolved;⁶⁹ it may still sue and be sued in its own name.⁷⁰ Even the appointment of a receiver does not have this effect, says Mr. Justice Clifford, in interpreting the national banking law. "Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, . . . but the corporate franchise of the

67 Cumbe v. Ueland, 72 Minn. 453, 457.

68 Thompson v. Johnson, 55 Minn. 515.

69 Chap. XXX. §§11, 19. Hurlburt v. Carter, 21 Barb. (N. Y.) 221; State v. Bank of Maryland, 6 Gill & J. (Md.) 205. A national bank that has gone into voluntary liquidation and provided for paying its debts by another bank to which it has transferred its assets, is not thereby dissolved and may sue and be sued. Pritchard v. Barnes, 101 Wis. 86.

70 Warner v. Imbeau, 69 Kan. 415; Bank v. Sewing Society, 28 Kan. 303; Sleeper v. Norris, 59 Kan. 555; Donnally v. Hearndon, 41 W. Va. 519.

association is not dissolved, and the association, as a legal entity, continues to exist.”⁷¹ None of the proceedings relating to the appointment of a receiver, the proving of claims and the paying of dividends support the theory that a banking association ceases to exist when the receiver is appointed, “nor at any time before the assets of the association are fully administered and the balance, if any, is paid to the owners of the stock or their legal representatives.”⁷²

The bank continues, notwithstanding the receiver’s appointment, unless it is extinguished by lapse of time, action of the stockholders or by forfeiture of its charter.⁷³ It is true that its powers are impaired, but its life is not extinct, it might fully revive, the receiver be discharged and continue business as before. Therefore, a bank, after passing into the possession of a receiver may be liable for rent under a lease, though the receiver may have surrendered the premises.⁷⁴

By common law the debts to, and from a bank are extinguished by its dissolution;⁷⁵ by statute they survive, and pending suits by and against it may be prosecuted to judgment.⁷⁶ Such power does not exist long, but long enough for the bank on the one hand to collect its debts, and on the other for cred-

⁷¹ Bank of Bethel v. Pahquioque Bank, 14 Wall. (U. S.) 383, 400; National Bank v. Insurance Co., 104 U. S. 54; Rosenblatt v. Johnston, 104 U. S. 462; Chemical Nat. Bank v. Hartford Dep. Co., 161 U. S. 1; Denton v. Baker, 48 U. S. App. 235; Security Bank v. National Bank, 2 Hun (N. Y.) 287; Hutchinson v. Crutcher, 98 Tenn. 421; Camp v. First Nat. Bank, 44 Fla. 497.

⁷² Bank of Bethel case, 14 Wall. 383, 398.

⁷³ Chemical Nat. Bank v. Hartford Carpet Co., 161 U. S. 1, 7.

⁷⁴ Ibid; People v. National Trust Co., 82 N. Y. 283.

⁷⁵ Bank v. Duncan, 56 Miss. 166; Commercial Bank v. Chambers, 8 Sm. & M. (Miss.) 9; Coulter v. Robertson, 24 Miss. 278; Saltmarsh v. Planters’ & Merch. Bank, 14 Ala. 668, 675, 676; Life Association v. Fassett, 102 Ill. 315.

⁷⁶ Bank v. Duncan, 56 Miss. 166; Lum v. Robertson, 6 Wall. (U. S.) 277; Bacon v. Robertson, 18 How. (U. S.) 480; Foster v. Essex Bank, 17 Mass. 245; Read v. Frankfort Bank, 23 Me. 318; Curran v. State of Arkansas, 15 How. 304; Life Association v. Fassett, 102 Ill. 315, 323.

itors to establish their claim.⁷⁷ Not infrequently it is limited by statute to three years or other period.⁷⁸

The principal mode of showing its existence and authority after the appointment of a receiver is in suing and defending itself against the suits of others,⁷⁹ in discharging its indebtedness and distributing its remaining property.⁸⁰ Even though the beneficial ownership of the thing in controversy belongs to another, the bank may maintain a suit for his benefit.⁸¹ But its power to do business is extinguished,⁸² and all further attempts by creditors to obtain liens and appropriate the bank's property are useless.⁸³ This, however, is not the law everywhere. In some states no action can be maintained against a bank after the appointment of an assignee or receiver,⁸⁴ no statutory damages or protested bills can be recovered;⁸⁵ no attachment can be continued;⁸⁶ no judgment be rendered or collected;⁸⁷ the bank is dead.

The more general conception of an insolvent bank is main-

77 See cases in note 80.

78 See cases in note 80.

79 Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, affg. 67 Ill. App. 169; Warner v. Imbeau, 63 Kan. 415; Valley Bank v. Ladies' Cong. Society, 28 Kan. 423; Sleeper v. Norris, 59 Kan. 555, 560; Huntsville Bank v. McGhee, 1 Stew. & Port. (Ala.) 306.

80 Saltmarsh v. Planters' & Merch. Bank, 14 Ala. 668; Conwell v. Pat-tison, 28 Ind. 509; Cunningham v. Clark, 24 Ind. 7; Cooper v. Curtis, 30 Me. 488; Folger v. Chase, 18 Pick. (Mass.) 63; Chemical Nat. Bank v. Armstrong, 8 C. C. A. 155, revg. 50 Fed. 798.

81 Camp v. First Nat. Bank, 33 So. (Fla.) 241.

82 Craig's Appeal, 92 Pa. 396; Read v. Frankfort Bank, 23 Me. 318, 321. In California under the bank commissioners' act for closing insolvent estates an action cannot be maintained against an insolvent bank in process of liquidation. See Acts of 1862, 1864, 1887 and 1895. Argues v. Union Sav. Bank, 133 Cal. 139; and Laidlaw v. Pacific Bank, 137 Cal. 392, containing a review of all the cases construing the acts on this subject.

83 Chemical Nat. Bank v. Armstrong, 8 C. C. A. 155, 158, revg. 50 Fed. 798.

84 Leathers v. Shipbuilders' Bank, 40 Me. 386.

85 Sanford v. Ky. Trust Bank, 1 Met. (Ky.) 106.

86 Leathers v. Shipbuilders' Bank, 40 Me. 386.

87 National Bank v. Colby, 21 Wall. (U. S.) 609, 615.

tained in Canada.⁸⁸ It still lives for the purpose of closing its business, and can sue and be sued as before.

8. Suspension of Authority of Officers.

Though the corporate life of a bank continues after it has gone into liquidation until after its affairs are settled, there is no authority on the part of the bank's officers to transact any business in its name that will bind the stockholders except that which is implied in the duty of liquidation, unless this has been expressly conferred by them. While this was said of the officers of a national bank, it has, we think, a general application.⁸⁹

9. Authority of Bank Pending Receiver's Appointment.

During the interval between a bank's assignment and the assignee's confirmation, the bank possesses very limited power, chiefly to protect its assets from loss. Notes and other obligations that mature may be collected, and defaults may be notified; in short, whatever is needful to protect the paper.⁹⁰

10. How Attachments Are Affected.

Though an attachment may be made for the same reasons against a state bank as against an individual, this cannot be done after the liquidating officer has taken possession,⁹¹ and perhaps not after the bank has assigned or taken steps to have insolvency declared and a receiver appointed.⁹² What rights, if any, some creditors can gain over others during this intermediary period are not as clearly defined in all the states as they might be.⁹³

The attachments made previously to a bank's declared insolvency, or within a prescribed period, are by the operation of

88 Rev. St. Cap. 129, §15; Ham v. Banque Ville Marie, 22 R. I. 248.

89 Craig's Appeal, 92 Pa. 396.

90 See Chap. XXX. §9.

91 Andrews v. Steele City Bank, 57 Neb. 173; Perego v. Bonesteel, 5 Biss. (U. S.) 66.

92 Atlas Bank v. Nahant Bank, 23 Pick. (Mass.) 480.

93 See 1 Shinn on Attachment, §424.

the judicial decree in many states dissolved.⁹⁴ In other states their validity is not affected and creditors can continue their suits, perfect their liens, and ultimately obtain the reward for their greater diligence.⁹⁵

A different rule applies to national banks. For several years some of the state tribunals sanctioned the attachment of these institutions prior to the rendition of final judgment against them.⁹⁶ but this action was disapproved by the final tribunal.⁹⁷ Since the Pacific National Bank case the state courts have everywhere recognized the finality of the decision then rendered.⁹⁸

94 Neb. Comp. Stat. Ch. VIII, Sec. 24; Andrews v. Steele City Bank, 57 Neb. 173, setting aside the former rule in Arnold v. Wiemer, 40 Neb. 216; Orr Shoe Co. v. Thompson, 89 Tex. 501; Crane v. Pacific Bank, 106 Cal. 64; Farmers' Bank v. Beaston, 7 Gill & J. (Md.) 421.

95 Hubbard v. Hamilton Bank, 7 Met. (Mass.) 340; Downer v. Brackett, 5 Law Rep. 392; Kittredge v. Warren, 14 N. H. 509; Wells v. Brander, 10 Sm. & M. (Miss.) 348; Walling v. Miller, 108 N. Y. 173; Breene v. Merchants' & Mech. Bank, 11 Colo. 97; Ballin v. Merchants' Ex. Bank, 89 Wis. 278; Life Association v. Fassett, 102 Ill. 315; *In re* Glen Iron Works, 20 Fed. 674. See High on Receivers, §138; 1 Wade on Attachment, §291; Morawetz on Priv. Corp. §864. In Breene v. Merchants' & Mech. Bank, 11 Colo. 97, 100, the court said: "The creditors of a corporation are not deprived of their legal remedies against it by reason of its insolvency. No action lies against a corporation, as such, after its dissolution. But before dissolution, and until some action is taken in court which, in its nature and effect, may operate to restrain or defeat the right so to do, creditors of a corporation are at liberty, and have the right, to pursue the remedies provided by law for the collection of demands justly due to them from such corporation unless they have in some way deprived themselves of such right. The remedy by attachment is one of the remedies so provided by law."

96 Robinson v. National Bank, 81 N. Y. 385; First Nat. Bank v. Colby, 46 Ala. 435.

Contra.—Crocker v. Marine Nat. Bank, 101 Mass. 240; Chesapeake Bank v. First Nat. Bank, 40 Md. 269; Central Nat. Bank v. Richland Nat. Bank, 52 How. Pr. (N. Y.) 136.

97 Pacific Nat. Bank v. Mixter, 124 U. S. 721.

98 Van Reed v. People's Nat. Bank, 173 N. Y. 314, reviewing many cases, affd. 198 U. S. 554; Bank v. Fidelity Nat. Bank, 112 N. Y. 667; Planters' Loan & Sav. Bank v. Berry, 91 Ga. 264; McDonald v. First Nat. Bank, 41 Ill. App. 368; Willard Mfg. Co. v. Merchants' Nat. Bank, 130 N. C. 609; Safford v. First Nat. Bank, 61 Vt. 373; Rosenheim Real Estate Co.

11. Right of a Creditor in Another State.

A creditor of a bank living in another state may attach property it may have there and hold it even against the receiver or assignee of the bank should it pass into legal insolvency.⁹⁹ This is based on the old-fashioned theory that every state will protect its own creditors without regard to others. It is a remnant of the ancient feeling that every state regarded every other as its enemy; and consequently it was the expedient thing to take every possible advantage, ignoring the most palpable fact, that by such a policy nothing in the end would be gained because effective retaliation was inevitable.

In harmony with the above rule the dissolution of a bank by judicial decree does not affect the rights of a creditor in another state whose action was then pending.¹

One breach in this rule has been made, as debts have no other status than that of the debtor; the deposits that an insolvent bank may happen to have in another state are covered by its assignment, and cannot be taken by one of its creditors who may be living in the foreign state. This break is not likely to be closed, for it is strongly sustained by reason and the fast-growing sense that the entire ancient rule is working more harm than benefit in our state systems where business relations are so close and are often undertaken and maintained without regard to state lines and conflicting state laws.²

v. Southern Nat. Bank, 46 S. W. (Tenn. Ch. App.) 1026; First Nat. Bank v. La Due, 39 Minn. 415; Dennis v. First Nat. Bank, 127 Cal. 453; Garner v. Second Nat. Bank, 66 Fed. 369; Harvey v. Allen, 16 Blatchf. (U. S.) 29.

99 Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; Kelly v. Crapo, 45 N. Y. 86; Green v. Van Buskirk, 7 Wall. (U. S.) 139. See §6a, and Chap. XXX, §19.

1 Hibernia Nat. Bank v. Lacombe, 48 N. Y. 367; Bank of Montreal v. Fidelity Nat. Bank, 1 N. Y. Supp. 852.

2 Caskie v. Webster, 2 Wall. Jr., (U. S.) 131. See City Insurance Co. v. Commercial Bank, 68 Ill. 348, 353; Mulliken v. Auginbaugh, 1 P. & W. (Pa.) 117; Wilson v. Carson, 12 Md. 54; Crippen v. Rogers, 67 N. H. 207. See an interesting article in 15 Am. L. Reg. 251, on the *lex loci* in regard to an insolvent assignment. In Union Sav. Bank v. Indianapolis Lounge Co., 20 Ind. App. 325, 329, 332, in which a failed Ohio bank had deposits in

12. Transfer of Stock.

As the power and liability of stockholders become fixed by the assignment, they cannot transfer their stock afterward, and thus avoid their obligations.³ And the same principle applies to the stockholder of a national bank that is voluntarily closed by the owners of two-thirds of the stock as provided by positive law.⁴

an Indiana bank the court said: "The only tangible thing the possession of which the Ohio bank could transfer to the trustee was some evidence of the debt owing the assignor by the Indiana bank. The thing assigned was a chose in action, and could have no situs other than that of the Ohio bank. It cannot be said that it had any actual situs in Indiana. The deed of assignment was broad enough to carry the chose in action in controversy. The only possession of the debt owing to the Ohio bank by the Indiana bank that could be given was by delivering the evidence of the debt. As the assignor's interest therein had been divested by its assignment there was nothing for the attachment to reach."

³ Irons v. Manufacturers' Nat. Bank, 17 Fed. 308; Crease v. Babcock, 23 Pick. (Mass.) 334, 346.

⁴ Muir v. Citizens' Nat. Bank, 80 Pac. (Wash.) 1007.

CHAPTER XXX.

APPOINTMENT AND AUTHORITY OF LIQUIDATING OFFICERS.

1. Kinds of receivers.
2. Authority of controller to appoint national bank receiver.
3. When court is justified in appointing.
 - a. Federal court.
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10. Removal and accountability of receiver.
11. Effect of assignment.
12. Receiver's powers.
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14. Nature of assets.
15. Receiver's duty in collecting assets.
16. His authority to settle and compound claims.
17. His authority to sell assets real and personal.
18. Authority of national bank receiver in another state.
19. Authority of state bank receiver in another state.
 - a. Can recover claims.
 - b. And take property under general voluntary assignment for benefit of all creditors.
- c. Recovery of unpaid subscriptions.
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- e. Reasons for and against rights of foreign creditors.
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20. Suits by and against national bank receiver.
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 - d. Is he ever barred from federal courts by lack of jurisdictional amount?
 - e. Suits to recover assessments.
 - f. Suits in state courts.
 - g. Rights of parties to sue him or the bank.
21. Removals to federal court.
22. Appeals by receiver.
23. Suits by and against state bank receivers.
24. Receiver's report.
25. Settlement without appointing a receiver.
26. Authority of agent appointed to settle bank's affairs.
27. Authority of savings bank managers to wind up their bank.
28. Receiver's appointment and action does not affect the statute of limitations.
29. Removal of receiver.

1. Kinds of Receivers.

On the insolvency of a bank an assignee or receiver is appointed to take charge of its property and settle its affairs. In modern practice a receiver is more generally appointed.

There are two kinds of receivers, statutory and judicial.¹ The former, as the name implies, is appointed by virtue of statutory authority; the other is appointed by the court and on fewer occasions.² The authority of a judicial receiver is more narrowly circumscribed;³ besides, he has no authority whatever outside the state of his appointment, because the court has none, save what is given to him by the operation of the beneficent principle of comity.

2. Authority of Controller to Appoint National Bank Receiver.

A receiver of a national bank is appointed by the controller,⁵ acting on the information of a national bank examiner. Until the contrary appears, the approval of the secretary of the treasury, his superior officer, is presumed.⁶ The controller's authority to appoint him is discretionary and cannot be reviewed,⁷ nor collaterally attacked.⁸ Nor is his authority affected by the right of the stockholders to put their bank into voluntary liquidation,⁹ or to select an agent to take charge of

1 Verplank v. Mercantile Ins. Co., 2 Paige (N. Y.) 438; U. S. Shipbuilding Co. v. Conklin, 60 C. C. A. 680; Henning v. Raymond, 35 Minn. 303. For a description of the power of a judicial receiver, see opinion of Swayne, J., in Davis v. Gray, 16 Wall. (U. S.) 203, 217.

2 Hegewisch v. Silver, 140 N. Y. 414; Herring v. N. Y. & Western R., 105 N. Y. 340; Henning v. Raymond, 35 Minn. 303.

3 Chautauqua Co. Bank v. Risley, 19 N. Y. 369; Loney v. Penniman, 43 Md. 130; Booth v. Clark, 17 How. (U. S.) 322; In re Kingon, 38 How. Pr. (N. Y.) 392, 394; Devendorf v. Dickinson, 21 How. Pr. (N. Y.) 275; Davis v. Gray, 16 Wall. (U. S.) 203, 217; McIlrath v. Snure, 22 Minn. 391; Battle v. Davis, 66 N. C. 252.

5 Rev. Stat. §5234.

6 Price v. Abbott, 17 Fed. 506; Stanton v. Wilkeson, 8 Ben. (U. S.) 357, 361; see Cadle v. Baker, 20 Wall. (U. S.) 650.

7 Kennedy v. Gibson, 8 Wall. 498, 505; Washington Nat. Bank v. Eckels, 57 Fed. 870.

8 Ibid; King v. Pomeroy, 58 C. C. A. 209, 212, 214.

9 Washington Nat. Bank v. Eckels, 57 Fed. 870.

its assets after the receiver has discharged his duties.¹⁰ As the controller can appoint, so can he remove the receiver.¹¹

The controller's authority to appoint a receiver is not exclusive.

3. When Court is Justified in Appointing.

(a.) In other cases a national bank receiver may be appointed by the federal court on the application of creditors for reasons that would not justify the controller in appointing him. The controller can thus act only on the bank's inability to make good its reserve, redeem its circulating notes, and other specific failures above mentioned. The court has broader authority than the letter of the law to declare that a bank's delinquencies justify the appointment of a receiver.¹³

A receiver thus appointed has broad authority to act, including authority to sue for the collection of all fixed and contingent assets, like a receiver appointed by the controller.¹⁴

(b.) While the national banking law has specified causes for which a receiver may be appointed to wind up a bank, this does not preclude the appointment of a receiver for other causes by state authority to take charge of the affairs of a bank.¹⁵ Thus, if a party within the bank has obtained control and diverts a special fund from the stockholders for whom it was intended to their own unlawful ends, a receiver may be appointed to prevent the consummation of the wrong.¹⁶

¹⁰ Ibid.

¹¹ Kennedy v. Gibson, 8 Wall. (U. S.) 498, 505.

¹² See King v. Pomeroy, 58 C. C. A. 209, for different reasons.

¹³ Irons v. Manufacturers' Nat. Bank, 6 Biss. 301, 303, affd. 121 U. S. 27; Harvey v. Lord, 11 Biss. 144; Wright v. Merchants' Nat. Bank, 1 Flippin (U. S.) 568; King v. Pomeroy, 58 C. C. A. 209.

¹⁴ See King v. Pomeroy, 58 C. C. A. 209, for a luminous discussion of his authority.

¹⁵ Cogswell v. Second Nat. Bank, 76 Conn. 252; Merchants & Planters' Nat. Bank v. Trustees, 63 Ga. 549 and 65 Ga. 603; Elwood v. First Nat. Bank, 41 Kan. 475.

¹⁶ Ibid.

¹⁷ Attorney-General v. Bank of Chenango, Hopk. Ch. (N. Y.) 596; Long v. Superior Court, 102 Cal. 449; People's Home Sav. Bank v. Superior Court, 103 Cal. 27; Murray v. American Surety Co., 17 C. C. A. 138; Hurlbut v. Marshall, 62 Wis. 590.

4. Appointment of State Bank Receivers.

The appointment of state bank receivers is regulated by statute. Often they are appointed through the action of the attorney general of a state, who proceeds at the request, or on the recommendation of one or more creditors, the bank commissioners, superintendent or inspector of banking, or other state officers.¹⁷ As the divesting of a bank of its property is usually by a summary method, the statute authorizing the procedure should be strictly construed.¹⁸ And when a defective appointment has been remedied by appointing another receiver, the court will direct the first one to deliver the property, if he has taken possession, to the other.¹⁹ In like manner the respective rights of two receivers for the same property appointed by different courts should be adjusted by yielding to the one that first acquired jurisdiction, whether state or federal.²⁰

Not infrequently the petition addressed to the court is accompanied with a prayer for an injunction to restrain the bank from continuing business while the petition for the receiver's appointment is pending. This is addressed to the discretion of the court, but its action thereon is not uniform in the state jurisdictions.²¹ In some of them if a *prima facie* is presented, an injunction is granted,²² in others, a clear case for its issue must be made out before granting even a temporary injunction.²³ And when issued it effectually discontinues the business save in accordance with its directions.²⁴ Circum-

¹⁸ *Ibid*; *Omaha Sav. Bank v. Rosewater*, 1 Neb. (Unof.) 723.

¹⁹ *Assignment of Union Bkg. Co.*, 12 Phila. 469.

²⁰ *McKay v. Van Kleeck*, 133 Mich. 27; *People v. Central City Bank*, 53 Barb. (N. Y.) 412; *High on Receivers*, §§50, 152.

²¹ *Hurlbut v. Marshall*, 62 Wis. 590; *Barnum v. Bank of Pontiac*, Harr. Ch. (Mich.) 116; *Case of Mechanics' Bank*, 5 Abb. Pr. (N. Y.) 374; *Murray v. American Surety Co.*, 17 C. C. A. 138.

²² *Bank of Columbia v. Attorney-General*, 3 Wend. (N. Y.) 588; *Barnum v. Bank of Pontiac*, Harr. Ch. (Mich.) 116; *Case of Mechanics' Bank*, 5 Abb. Pr. (N. Y.) 374; *Dobson v. Simonton*, 78 N. C. 63.

²³ *Barnum v. Bank of Pontiac*, Harr. Ch. (Mich.) 116.

²⁴ *Atlas Bank v. Nahant Bank*, 23 Pick. (Mass.) 480.

stances, or statute,²⁵ may justify the appointment of a receiver on proper proof presented by a single stockholder.²⁶ But as the petition, though brought by a single creditor, is for the benefit of all, it cannot be discontinued on his sole request.²⁷

Like a national bank receiver, his title cannot be attacked collaterally.²⁸ It has been maintained that if the decree appointing a receiver is absolutely void, his title may be attacked in another proceeding.²⁹

5. Number That Should be Appointed.

The number of receivers is often discretionary with the courts, and if two or more are appointed and a vacancy happens by death, resignation or removal, the court may fill the place, or direct the other two to act without further assistance.³⁰

Should another receiver be appointed, he may continue or defend a suit to which his predecessor was a party in accordance with the rules of practice where the substitution is made.³¹

6. Their Selection.

The selection of an assignee or a receiver is an important matter. Generally, the stockholders or directors who have authority to make an assignment can select the persons who are to administer the assigned estate, subject to judicial approval.³² While creditors have no voice in the selection³³ they make their opposition known in court, to which due heed will be

25 Dickerson v. Cass Co. Bank, 95 Iowa 392.

26 Ibid; Warren v. Fiske, 49 How. Pr. (N. Y.) 430; People v. Weighley, 155 Ill. 491.

27 Atlas Bank v. Nahant Bank, 23 Pick. (Mass.) 480.

28 Cook v. Citizens' Nat. Bank, 73 Ind. 256; Richards v. People, 81 Ill. 551; Howard v. Palmer, Walk. (Mich.) 391; Basting v. Ankeny, 64 Minn. 133; Skinner v. Lucas, 68 Mich. 424; Brynjolfson v. Orthus, 12 N. Dak. 42.

29 People v. Weighley, 155 Ill. 491.

30 Wiswell v. Star, 48 Me. 401, 406.

31 Ibid. Schaberg v. McDonald, 60 Neb. 493. See Inglehart v. Bierce, 36 Ill. 133.

32 In re Union Banking Co., 12 Phila. 469.

33 News v. Shackamaxon Bank, 16 Pa. Week. Notes 207.

given.³⁴ An officer of a bank ought not to be chosen,³⁵ but the ownership of a small quantity of stock by a person otherwise qualified is no objection.³⁶ A corporation may be appointed a receiver if endowed with authority, and not infrequently a trust company serves in that capacity.³⁷

7. Oath, Bond, Compensation.

A receiver is usually required to take an oath before beginning his duties, but as this is merely directory, its omission will not affect the legality of his action.³⁸ He must give a bond with sureties also for the faithful fulfillment of his duties. But if the period for performing them is lengthened by legislative action without the assent of his sureties, they are discharged from liability during the extended period.³⁹

His compensation and expenses are chargeable against the fund that comes into his possession. If this should prove to be inadequate to compensate him reasonably, the proper court may require the parties at whose instance the insolvency proceedings were undertaken to pay the deficiency.⁴⁰

8. National Bank Receiver is a National Officer.

A receiver of a national bank is an officer and agent of the United States;⁴¹ more especially he is the instrument of the controller.⁴² His commission is required by the controller and

34 News v. Shackamaxon Bank, 16 Pa. Week. Notes 207.

35 Ibid.

36 Ibid.

37 In re Knickerbocker Bank, 19 Barb. (N. Y.) 602; Citizens' Trust & Deposit Co. v. Tompkins, 97 Md. 182.

38 Dayton v. Borst, 7 Bos. 115, affd. 31 N. Y. 435.

39 Governor v. Lagow, 43 Ill. 134.

40 Frick v. Fritz, 124 Iowa 529; Farmers' Nat. Bank v. Backus, 74 Minn. 264; Knickerbocker v. McKindley Coal Co., 67 Ill. App. 293.

41 Ellis v. Little, 27 Kan. 707, 719; Kennedy v. Gibson, 8 Wall. (U. S.) 498; Gibson v. Peters, 150 U. S. 342; Price v. Abbott, 17 Fed. 506; Frelinghuysen v. Baldwin, 12 Fed. 395; Pacific Bank v. Mixter, 114 U. S. 463; In re Chetwood, 165 U. S. 443.

42 Kennedy v. Gibson, 8 Wall. (U. S.) 498, 505; Casey v. Galli, 94 U. S. 673; In re Chetwood, 165 U. S. 443; Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518.

is admissible in court without other proof.⁴³ Consequently he does not, by applying to a court for the sale of property, become its officer or place the assets of the bank within its control.⁴⁴

9. Provisional or Temporary Receiver.

Sometimes a person is appointed provisionally to examine into the affairs of the bank. He does not possess any specific power, and acts only under the directions given to him by the controller, or other authority.⁴⁵ Perhaps his most specific duty is that of a custodian and caretaker of the property until some further order or disposition is made of it.⁴⁶

In New York, by statute, a provisional or temporary receiver is endowed with larger and more precise powers. He can preserve and dispose of the property under instructions by the court.⁴⁷

Again, a state court may act temporarily to protect the rights of creditors of a national bank until the appointment by the controller, or a federal court, of a receiver.⁴⁸

Lastly, a temporary injunction for the appointment of a receiver may be dissolved and an order be issued to continue business. Thus, if the proper court is satisfied of the bank's solvency, the integrity of its officers, and that its business may be resumed without injury to the public and with safety to creditors and stockholders, the order may be given.⁴⁹

43 Davis v. Watkins, 56 Neb. 288.

44 In re Chetwood, 165 U. S. 443; Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518.

45 See Jackson v. Fidelity & Casualty Co., 21 C. C. A. 394; Elwood v. First Nat. Bank, 41 Kan. 475; Cogswell v. Second Nat. Bank, 76 Conn. 252. See Chap. XXIX, §9.

46 Herring v. N. Y. & Western R., 105 N. Y. 340.

47 Code Civ. Proceed. §§1788, 1789. See People v. St. Nicholas Bank, 76 Hun (N. Y.) 522 for a construction of the statute. He can bring a suit. Sickles v. Herold, 149 N. Y. 332.

48 Merchants & Planters' Nat. Bank v. Trustees of Masonic Hall, 63 Ga. 549; Elwood v. First Nat. Bank, 41 Kan. 475.

49 Bank Commissioners v. Bank of Buffalo, 6 Paige (N. Y.) 497.

10. Removal and Accountability of Receiver.

Though both he and his sureties are liable for any failure of duty,⁵⁰ he cannot be removed on the application of the same persons or authority who sought his appointment;⁵¹ nor can he be held liable for negligence when he is acting by the direction of a board of control.⁵² But when he is wasting the estate, stockholders and creditors can interfere by proper action.⁵³ And should he withdraw a deposit on his own check, which could be legally done only by the countersignature of the judge that appointed him, he could be attacked and punished for disregarding the order of the court, as well as for his failure or refusal to pay into court, when ordered, the misappropriated fund.⁵⁴

11. Effect of Assignment.

An assignment does not destroy the bank's corporate existence,⁵⁵ or extinguish its franchise.⁵⁶ The assets, not the franchise, are assigned. The receiver or assignee, therefore, does not become the corporation; he merely takes the assets for collection and distribution.⁵⁷

Yet some radical consequences result from an assignment and the appointment of an assignee or receiver. The bank's right to exercise its franchise is suspended;⁵⁸ its officers cannot

50 State v. Claypool, 13 Ohio St. 14.

51 Ibid.

52 Lafayette Bank v. Buckingham, 12 Ohio St. 419.

53 Attorney General v. Bank, 1 Paige (N. Y.) 511; Robinson v. Lane, 19 Ga. 337; Tindall v. Westcott, 113 Ga. 1114.

54 Tindall v. Westcott, 113 Ga. 1114.

55 Hurlbut v. Carter, 21 Barb. (N. Y.) 221, 224; Germantown R. v. Fitler, 60 Pa. 124; Ahrens v. State Bank, 3 Rich. (S. C., N. S.) 401. See Chap. XXIX, §7.

56 Town v. Bank of River Raisin, 2 Doug. (Mich.) 530.

57 Hurlbut v. Carter, 21 Barb. (N. Y.) 221, 224; State v. Real Estate Bank, 5 Ark. 595; State v. Bank, 6 Gill & J. (Md.) 205; Ahrens v. State Bank, 3 Rich. (S. C., N. S.) 401.

58 Bank of Bethel v. Pahquioque Bank, 14 Wall. (U. S.) 383, 400; Brynjolfson v. Osthuis, 12 N. Dak. 42; Linville v. Hadden, 88 Md. 594. "As a going concern, the corporation is ended. The former stockholders can never again have any control of the corporation. . . Nor are the

make valid transfers of its assets;⁵⁹ or pay a check previously drawn by a depositor.⁶⁰ A creditor of the bank can no longer levy an attachment,⁶¹ or a creditor of a depositor serve a garnishee process,⁶² and the title to all the property passes to the receiver for the benefit of the bank's creditors.⁶³ A depositor can no longer apply his deposit to pay a debt the bank may have against him,⁶⁴ or withdraw his funds therefrom.⁶⁵ Moreover, though suits survive and others can be begun for, and against the bank, these are regarded rather as the accidents of its existence, which will soon cease.⁶⁶

12. Receiver's Powers.

The general powers of a statutory receiver are defined by statute.⁶⁷ "He represents the bank, its stockholders, its creditors, and does not in any sense represent the government."⁶⁸

directors . . . any longer competent to perform corporate acts, except liquidation." *Bank v. Johnston*, 133 Cal. 185, 187. *High on Receivers*, §290, 3d Ed.

59 *Ibid.*

60 *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168, affg. 43 Hun 167. See Chap. XX. §39.

61 *Baring v. Galpin*, 18 At. (Conn.) 266; *Farmers' Bank v. Beaston*, 7 Gill & J. (Md.) 421, 428; *Cockey v. Leister*, 12 Md. 124; *Bentley v. Shrieve*, 4 Md. Ch. 412.

62 *Ibid.*

63 *Brynjolfson v. Osthus*, 12 N. Dak. 42; *Bank of Tennessee v. Horn*, 17 How. (U. S.) 157; *Attorney-General v. Atlantic Ins. Co.*, 100 N. Y. 279; *Morgan v. N. Y. Railroad*, 10 Paige (N. Y.) 290; *Attorney-General v. Continental Life Ins. Co.*, 92 N. Y. 630; *Osgood v. Maguire*, 61 N. Y. 524.

64 *National Security Bank v. Butler*, 129 U. S. 223. But see *First Nat. Bank v. Hall*, 119 Ala. 64.

65 Chap. XXIX. A different rule prevails in states which hold that the giving of a check assigns the deposit. *Niblack v. Park Nat. Bank*, 169 Ill. 517. In such a state the holder of the check is entitled to the deposit even though the drawer was at the time indebted to the bank on a note. *Ibid.*

66 See Chap. XXIX. §7.

67 *Union Bank v. Kansas City Bank*, 136 U. S. 223; *State v. Claypool*, 13 Ohio St. 14.

68 *Case v. Terrell*, 11 Wall. (U. S.) 199, 202; *Scott v. Armstrong*, 146 U. S. 499; *Cockrill v. Abeles*, 30 C. C. A. 223; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Hayes v. Kenyon*, 7 R. I. 136; *Weslosky v. Quarterman*, 123

He is vested with all the assets of the bank which are to be converted into money and distributed fairly among the creditors.⁶⁹

As he is an officer of the court, he may apply to it on all proper occasions for instructions.⁷⁰ And as he stands in place of the bank with respect to its assets, he is regarded as knowing all the facts about them that were known by its officers.⁷¹ Lastly, if he employs an assistant, he is affected by the same rules concerning the imputation of knowledge as any other principal.⁷²

The property that passes to a receiver is under the control of the court to be administered in such a manner as will best subserve the purposes of equity. “[The court] cannot take away, or cancel, or discharge a just debt, but it can regulate the mode of securing and obtaining it. It can say to a party who has two funds, one separate and the other in common with others, you must first look for payment of your debt to the fund you hold alone, and which other creditors cannot touch; and then, if you are not satisfied, you can resort to the fund in which others have an interest as well as yourself.”⁷³

13. Persons Dealing with Him Must Have Knowledge of His Authority.

As the power of a receiver is restricted, a person dealing

Ga. 312; McGregor v. Third Nat. Bank, 124 Ga. 557; Brynjolfson v. Osthus, 12 N. Dak. 42; Price v. Abbott, 17 Fed. 506, 507. A receiver represents the creditors and is the proper person to maintain an action to set aside a chattel mortgage on the bank's property. National State Bank v. Vigo Co. Nat. Bank, 141 Ind. 352.

69 Price v. Abbott, 17 Fed. 506, 507; Hayes v. Kenyon, 7 R. I. 136, 142.

70 In re Van Allen, 37 Barb. (N. Y.) 225; People v. St. Nicholas Bank, 76 Hun (N. Y.) 522.

71 People's State Bank v. Francis, 8 N. Dak. 369.

72 Thus an agent employed by a receiver to procure a mortgage to secure a debt who learns the fraudulent purpose of making it thereby binds the receiver with such knowledge. Watts v. Dubois, 66 S. W. (Tex. Civ. App.) 608.

73 State Bank v. Bank of New Brunswick, 3 Green's Ch. (N. J.) 266, 273.

with him must have knowledge of his authority.⁷⁴ He cannot, for example, agree with an attorney to give him one-half the proceeds of a mortgage for collecting it. He has, indeed, authority to employ counsel to represent him in such litigation as may be necessary and to pay him reasonably for his services, but not in the manner above described.⁷⁵ And if a receiver should make an agreement without adequate authority, "the estate cannot be charged for damages resulting from the failure or inability of the receiver to convey or deliver property not belonging to the bank, nor for his refusal to comply with covenants which he was without power as the receiver to make."⁷⁶

14. Nature of Assets.

So long as a bank is solvent, no general creditor has any lien on his property; the bank's right to use its own is absolute.⁷⁷ But, after its insolvency, then, in the language of Justice Bradley, "it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors."⁷⁸

(a.) The assets may be divided into four classes. The first class includes all the land, notes and other obligations belonging to the bank, which immediately pass to the receiver.⁷⁹

(b.) The second kind of assets belonging to the receiver are conditional assets, unpaid subscriptions,⁸⁰ dividends unlawfully

74 *Beckham v. Shackelford*, 8 Tex. Civ. App. 660, 664; *Ellis v. Little*, 27 Kan. 707, 720.

75 *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222.

76 *Ellis v. Little*, 27 Kan. 707, 719.

77 *McDonald v. Williams*, 174 U. S. 397, 401.

78 *Graham v. Railroad Co.*, 102 U. S. 148, 161; *State v. Commercial State Bank*, 28 Neb. 677.

Contra.—*Catlin v. Eagle Bank*, 6 Conn. 233.

79 See Ch. 29, §6. A note contributed by the director of a bank to supply a deficit in its capital on its subsequent failure becomes an asset and may be recovered by the receiver. *Sickles v. Herold*, 11 N. Y. Misc. 583.

80 *Eppright v. Nickerson*, 78 Mo. 482; *Fox's Appeal*, 93 Pa. 406; *West Chester & Phila. R. v. Thomas*, 2 Phila. 344.

paid. The questions relating to unpaid stock have already been considered.⁸¹ Dividends paid after the insolvency of the bank may be recovered.⁸² But dividends paid previously out of capital without the stockholder's knowledge and received by him in good faith cannot be recovered by the receiver.⁸³ Though the directors may be guilty of violating the law, their conduct forms no basis of action for proceeding against the stockholders.

(c.) The third class of assets is the contingent liability of stockholders to an additional contribution to pay the bank's creditors. This is generally known as the double liability. By the national banking law this is an asset which the receiver is authorized to recover;⁸⁴ also by the laws of some of the states; by others, this liability can be enforced only by the creditors.

(d.) Lastly, by the national banking law and the laws of some of the states, the liability of the directors is a contingent asset for which the receiver can sue;⁸⁵ in other states, action against them must be taken by the creditors.

15. Receiver's Duty in Collecting Assets.

The receiver should take possession of the real estate, if there be any,⁸⁶ collect all the assets belonging to the bank, and to that end should bring such actions as may be needful. And ordinarily he can sue for a claim due to the bank without an

81 See Chap. V. §§1-10.

82 Hayden v. Williams, 37 C. C. A. (U. S.) 479.

83 McDonald v. Williams, 174 U. S. 397.

84 Rev. Stat. §5234. Howarth v. Angle, 162 N. Y. 179.

85 Cockrill v. Cooper, 29 C. C. A. 529; Briggs v. Spaulding, 141 U. S. 132; Simmons v. Taylor, 106 Tenn. 729. Wherever a statute provides that an action for injuries produced by fraudulent representations shall survive, an assignee of a state bank that has succeeded a national bank may maintain an action for damages alleged to have been sustained by his assignor in consequence of the defendant's fraudulent conduct as director of its predecessor. Hicks v. Steel, 142 Mich. 292.

86 Baker v. Cooper, 57 Me. 388, 390.

order from the controller⁸⁷ or court.⁸⁸ It is no less his duty to resist all illegal or improper claims. This he should do for the cause of justice and the obvious interest of the stockholders and all deserving creditors. Among these are torts.⁸⁹

As the receiver steps into the place of the bank he acquires all its rights to collect its assets and is subject to the same defences.⁹⁰ He must collect all the debts due to the bank, regardless of the amount needed to pay its indebtedness;⁹¹ must follow the bank's property, whatever may be the form of conversion, so long as it can be traced,⁹² and recover all wrongful payments or preferences;⁹³ must collect the surplus of all property pledged by the bank having due regard for the terms of the pledge.⁹⁴ He can, in no case, repudiate the pledge and yet retain the property itself.⁹⁵ If bonds are pledged by a bank with another as security for overdrafts, this must be regarded before the holders of bills subsequently drawn by the pledger.⁹⁶

It need hardly be added that all trust funds not belonging to the bank should be given up to their owners. Of course,

87 Bank v. Kennedy, 17 Wall. (U. S.) 19, 22. "The language of the statute authorizing the appointment of a receiver to act under the direction of the controller means no more than that the receiver shall be subject to the direction of the controller. It does not mean that he shall do no act without special instruction. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do." Bradley, J., Kennedy v. Gibson, 8 Wall. (U. S.) 498, 506.

88 In re Van Allen, 37 Barb. (N. Y.) 225.

89 Brown v. Trail, 89 Fed. 641; Chase v. Curtis, 113 U. S. 452.

90 Alderson on Receivers, §§ 257, 258. An assignee or receiver cannot have a fraudulent conveyance by a grantor set aside, because he cannot impeach the grantor's conveyance. Roan v. Winn, 93 Mo. 503.

91 Davis v. Robertson, 11 La. Ann. 752.

92 Sadler's Appeal, 87 Pa. 154.

93 Lamb v. Cecil, 25 W. Va. 288; Atkinson v. Rochester Printing Co., 114 N. Y. 168.

94 Smith v. Lansing, 22 N. Y. 520; Casey v. Cavacroc, 96 U. S. 467, revg. 2 Woods (U. S.) 77.

95 Ibid.

96 Garvin v. State Bank, 7 S. C. 266.

the proof of ownership must be clear before thus surrendering the property.

16. His Authority to Settle and Compound Claims.

His authority to settle and compound claims in favor of or against the bank is chiefly regulated by statute.⁹⁷ In most cases his action must be sanctioned by the court,⁹⁸ but, subject to this limitation, his authority extends to many kinds of claims, including the double liability of stockholders.⁹⁹ A national bank receiver must act in a similar manner.¹ Again, when he has brought suits, these cannot be settled without leave of the court in which they are pending.² But when this is done, they cannot be opened years afterward, especially if there has been no fraud.³

To the authority of the national bank receiver there is another important limitation. Even the court cannot authorize him to compound an uncollectible assessment,⁴ though he could get more than by enforcing the law against the delinquent stockholder.⁵

Concerning an extension of time for paying a debt due to the bank, this may be given by the receiver on sufficient consideration if he can thereby enhance the probability of receiv-

⁹⁷ In Nebraska by statute a receiver may compound all bad or doubtful debts with judicial approval, including claims against stockholders for their double liability. *State v. Bank of Rushville*, 57 Neb. 608; *State v. German Sav. Bank*, 65 Neb. 416; *Morrison v. Lincoln Sav. Bank*, 2 Neb. (Unof.) 762.

⁹⁸ *State v. German Sav. Bank*, 65 Neb. 416; *State v. Bank*, 57 Neb. 608; *State v. Nebraska Sav. & Ex. Bank*, 61 Neb. 496.

⁹⁹ *Ex parte Chetwood*, 165 U. S. 443, 458; *State v. German Sav. Bank*, 65 Neb. 416; *State v. Bank*, 57 Neb. 608; *Morrison v. Lincoln Sav. Bank*, 2 Neb. (Unof.) 762. If a receiver fails to show cause on proper judicial order, why a proposed settlement of a claim should not be authorized, the court may direct him to accept the terms of settlement in order to avoid litigation. *McGregor v. Third Nat. Bank*, 124 Ga. 557.

¹ *In Matter of Petition of Platt*, 1 Ben. (U. S.) 534.

² *Case v. Small*, 4 Woods (U. S.) 78.

³ *Henderson v. Meyers*, 11 Phila. 616.

⁴ *In re Earle*, 96 Fed. 678; *Price v. Yates*, 19 Fed. Cases 2322.

⁵ *In re California Nat. Bank*, 53 Fed. 38.

ing a larger or complete payment. "It is inconceivable that all the details of collection are to be submitted to the controller, and his orders received thereon. Nothing of that kind was ever contemplated, and nothing of that kind is ever done in practice."⁶

17. His Authority to Sell Assets Real and Personal.

A receiver may sell the real and personal property of the bank on such terms as the court may direct.⁷ Nor need this application be founded on special authority obtained from the controller.⁸ But a court has no power to order a receiver to sell pledged securities at private sale.⁹

18. Authority of National Bank Receiver in Another State.

By the national banking law a receiver of a national bank knows no state lines and limitations in administering his trust. He can collect all the assets belonging to his bank, regardless of their location, and sue in any court, regardless of the place where the bank lived and acted. He can sue all debtors, stockholders, for their unpaid subscriptions, or double liability, and directors for mismanagement. In short, as he truly represents the creditors as well as the bank he can collect by aid of the courts, every claim, whatever its nature, which they have any right to appropriate for the payment of the bank's indebtedness.¹⁰

19. Authority of State Bank Receiver in Another State.

The good results of this law and the growing realization

6 People's State Bank v. Francis, 8 N. Dak. 369, 375.

7 Ellis v. Little, 27 Kan. 707; In re Van Allen, 37 Barb. (N. Y.) 225; In re Hollister Bank, 23 N. Y. 508.

8 Receiver v. Syndics, 52 La. Ann. 1613. See same case under the name of Turner v. Richardson, 180 U. S. 87.

9 In re Earle, 92 Fed. 22.

10 King v. Pomeroy, 58 C. C. A. (U. S.) 209; Boyd v. Schneider, 124 Fed. 239. The plaintiff having been appointed receiver of an insolvent bank in Vermont, he obtained an order for the sale of bonds pledged to the bank by a Canadian railroad. The company sought to recover the bonds through a Canadian court. A bill to prevent the prosecution of the suit was sustained by a federal court in Vermont. Hendee v. Conn. & P. R., 26 Fed. 677.

that modern business is done with less regard to state lines than formerly, and that, as far as possible, the rights of all are best preserved and enforced by establishing, as far as practicable, a uniform system of jurisprudence, based on the principle of justice and equality of rights, are leading the courts to permit receivers from other states to come within their jurisdictions and invoke its remedies for the common good.¹¹

(a.) Thus, a receiver, trustee or assignee may institute a suit in another state where a debtor of the bank may reside to enforce its collection.¹²

(b.) By comity, too, an assignee, under a general voluntary assignment of all the property of a bank for the equal benefit of all its creditors, can take any property attached after the assignment by a resident creditor. In a well-reasoned case the court declared that "if such assignment be valid, or, in other words, be in harmony with the laws of the state where the property is situated, the title passes, and the rights of the assignee should be protected against subsequent attaching creditors."¹³ Nor can a foreign creditor, living in a state to which property rightfully belonging to a receiver is temporarily taken, deprive him of it and apply it to the satisfaction of his particular debt.¹⁴

The distinction between the effect of a voluntary and invol-

11 *Swing v. Bentley Furniture Co.*, 45 W. Va. 283; *Grogan v. Egbert*, 44 W. Va. 75; *Bank v. McLeod*, 38 Ohio St. 174; *Hurd v. City of Elizabeth*, 41 N. J. Law 1. See lengthy note, 23 L. R. A. 52.

Contra.—*Bank v. Motherwell Iron Co.*, 95 Tenn. 172; *Booth v. Clark*, 17 How. (U. S.) 322.

12 *Lombard Bank v. Thorp*, 6 Cow. (N. Y.) 46; *Hoyt v. Thompson*, 5 N. Y. 320, 340, 341; *Pugh v. Hurt*, 52 How. Pr. (N. Y.) 22; *Graydon v. Church*, 7 Mich. 36; *Hallam v. Ashford*, 24 Ky. L. Rep. 870, and cases cited; *Swing v. Bentley Furniture Co.*, 45 W. Va., 283, and Stat. of 1885, Ch. 39, superseding the rule in *Nimick v. Iron Works Co.*, 25 W. Va. 184.

13 *Johnson v. Sharp*, 31 Ohio St. 611, 620; *Bank v. McLeod*, 38 Ohio St. 174; *Coffin v. Kelling*, 83 Ky. 649, and cases cited; *Zacher v. Fidelity Trust Co.*, 45 C. C. A. 480, 483.

14 *Chicago & St. Paul R. v. Keokuk Northern Packet Co.*, 108 Ill. 317; *Bank v. McLeod*, 38 Ohio St. 174. See dissenting opinion by Thornton, J., in *Humphreys v. Hopkins*, 81 Cal. 555.

untary assignment of this character must be regarded. The voluntary transfer is valid everywhere because it is the exercise of the owner's right to dispose of his own, while an assignment by operation of law has no valid legal operation outside the state in which the law was passed.¹⁵

On the other hand, a creditor who attaches such property before it is taken by the receiver can hold it against him as security for his debt.¹⁶ Many states, to this extent, still favor their own creditors to the exclusion of creditors in general to share in the assets of an insolvent bank.

(c.) A foreign receiver or assignee can sue a stockholder living in another state for his unpaid subscription. The courts have had no great difficulty in exercising comity to this extent.¹⁷ It was so evident that a stockholder should be required to execute his plain contract that courts did not hesitate long in permitting foreign receivers and trustees to avail themselves of all legal means to enforce the just obligations of stockholders living within their jurisdiction.

15 Roberts v. Norcross, 69 N. H. 533; Cole v. Cunningham, 133 U. S. 107; Barnett v. Kinney, 147 U. S. 476; Frank v. Bobbitt, 155 Mass. 112; Sawyer v. Levy, 162 Mass. 190.

16 Grogan v. Egbert, 44 W. Va. 75; Hoyt v. Thompson, 5 N. Y. 320; Humphreys v. Hopkins, 81 Cal. 551; City Ins. Co. v. Commercial Bank, 68 Ill. 348; Zacher v. Fidelity Trust Co., 45 C. C. A. 480; Com. Nat. Bank v. Motherwell Iron Co., 95 Tenn. 172; Johnston v. Rogers, 43 S. W. 493; Booth v. Clark, 17 How. (U. S.) 322; Security Trust Co. v. Dodd, 173 U. S. 624. By the laws of New Hampshire, when an insolvent corporation is in process of dissolution, accompanied with ancillary proceedings, a judgment of a court where such proceedings are had is conclusive in the former state only so far as it relates to property within the limits of the state rendering the judgment, although an assignee appointed by the New Hampshire court was a party to the proceedings. Bank Commissioners v. Granite State Provident Assn., 70 N. H. 557.

17 Stoddard v. Lum, 159 N. Y. 265. For more cases see Chap. V. §10. In Iowa the right of a foreign receiver to come in that State and enforce an unpaid subscription is squarely denied. Wyman v. Eaton, 107 Iowa 214; and in Nebraska, Fitzgerald v. Fitzgerald Construction Co., 41 Neb. 374, 407; also a foreign trustee, Parker v. Lamb, 99 Iowa 265; Ayres v. Siebel, 82 Iowa 347. Formerly, by the federal rule a receiver could not sue in another state for any debt. Booth v. Clark, 17 How. (U. S.) 322.

(d.) The courts have been slower in opening their doors for the enforcement of the double liability of stockholders. But in nearly every state this is now permitted.¹⁸ The breadth of the modern reasoning on which this extension of the principle of comity is founded is in striking contrast with the narrow technical reasoning whereby the courts have sought to cling to their older isolated ways.

(e.) The principal objection to opening the doors of the court to a foreign receiver is that property may thereby be taken out of the state to the injury of its own creditors. The courts that are still living under the spell of the medieval theory of government, when every man's hand was against every other, overlook the most ordinary fact that its own citizens may be, and often are, creditors in other states to whom its own narrow rule will be surely applied to their manifest injury. The plainest teachings of experience commend the adoption and application of the same rule by every state to all creditors, whether resident or non-resident, thereby promoting simplicity of the law and more perfect justice. The wise utterance of the Supreme Court of Ohio should be heeded: "The nature of the union between the states, as members of a common government, the vital interests which bind them together, should lead us to presume a greater degree of comity in commercial, as well as in political affairs, than we should be authorized to presume between states wholly foreign to each other."¹⁹ Slowly the courts are moving in that direction. The National Bankruptcy law is a solid advance. Of course, if there be no creditors in a foreign state where the debtor has property, the courts will permit the receiver to acquire possession and full control.²⁰

(f.) "Whatever orders, judgments, or decrees may be ren-

¹⁸ Howarth v. Lombard, 175 Mass. 570; Howarth v. Ellwanger, 86 Fed. 54. See Ch. V. §11.

¹⁹ Bank v. McLeod, 38 Ohio St. 174. A strong defence of the old doctrine has recently been made by the Supreme Court of Wisconsin. Filkins v. Nunnemacher, 81 Wis. 91.

²⁰ Comstock v. Frederickson, 51 Minn. 350.

dered by the courts of another state, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another state come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a state in which ancillary administration is held are not conclusive upon the administration in the courts of the state in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one state permits himself or itself to be made a party to the litigation in the other.”²¹

20. Suit By and Against National Bank Receiver.

Passing from the authority of receivers to sue in other states, let us inquire into the authority of a national bank receiver to sue and be sued in other jurisdictions.²²

(a.) If a suit is pending against a national bank at the time of the receiver's appointment, he can be substituted for the bank. This should be done instead of making him an additional party defendant. Nor can a bank after his appointment appeal from any order relating to the dissolution of an attachment made before its failure. He alone can act.²³

(b.) If a national bank is sued after his appointment, it is only a nominal party, as he is accountable for its property.²⁴

(c.) Again, in what courts can suits by and against the receiver be brought? On a matter of so much practical importance there ought to be less diversity of opinion. As a receiver is a federal officer,²⁵ by the rule more widely observed he can

21 Reynolds v. Stockton, 140 U. S. 254, 272.

22 See especially, Act March 3, 1887, 49 Cong. 2 Sess. Chap. 359.

23 Sioux Falls Nat. Bank v. First Nat. Bank, 6 Dak. 113.

24 Grant v. Spokane Nat. Bank, 47 Fed. 673.

25 See criticism of Price v. Abbott, 17 Fed. 506, in Thompson v. Pool, 70 Fed. 225, whether the appointment of a receiver by the controller of the currency is an appointment by the head of a department of the government and therefore an officer of the United States.

maintain a suit on any matter pertaining to the bank in its name or his own, regardless of the questions of citizenship or the amount involved.²⁶ This rule has been somewhat narrowed by some courts in two ways that will now be considered.

It has been contended that a federal court is open to a receiver only for the adjudication of a federal question.²⁷ As the question of set-off to a note due by a depositor involves no question of the kind, the receiver cannot seek the aid of a federal tribunal.²⁸ And in an earlier case Justice Bradley, sitting as a circuit judge, declared that a national bank receiver did not have the privilege in all cases of "being sued in the United States courts."²⁹ Nevertheless, the strong trend of authorities sustains the position that the door of the federal courts is wide open to the receiver in all cases; even those not involving a federal question.³⁰ In one of the latest cases Judge Sanborn, speaking for himself and his two associates, says: "An action by or against a receiver of a national bank is an action arising under the laws of the United States, because the act of Congress creates his office, grants his rights and powers, and enforces his duties. Every action by or

²⁶ Gibson v. Peters, 150 U. S. 342; see Kennedy v. Gibson, 8 Wall. (U. S.) 498, and Bank v. Kennedy, 17 Wall. 19; Thompson v. Pool, 70 Fed. 725; Bartley v. Hayden, 74 Fed. 913; Thompson v. German Ins. Co., 76 Fed. 892; Short v. Hepburn, 75 Fed. 113; Armstrong v. Ettlesohn, 36 Fed. 209; Grant v. Spokane Nat. Bank, 47 Fed. 673; Yardley v. Dickson, 47 Fed. 835; Armstrong v. Trautman, 36 Fed. 275; Linn Co. Nat. Bank v. Crawford, 69 Fed. 532; Fisher v. Yoder, 53 Fed. 565; Frelinghuysen v. Baldwin, 12 Fed. 395; Platt v. Beach, 2 Ben. (U. S.) 303; Stanton v. Wilkeson, 8 Ben. (U. S.) 357; Price v. Abbott, 17 Fed. 506; Stephens v. Bernays, 41 Fed. 401, affd. 44 Fed. 642; Stephens v. Bernays, 119 Mo. 143.

²⁷ Tehan v. First Nat. Bank, 39 Fed. 577.

²⁸ Ibid.

²⁹ Bird v. Cochrem, 2 Woods (U. S.) 32.

³⁰ Same case as in note 26. In Armstrong v. Trautman, 36 Fed. 275, Jackson, J., said: "Prior to the act of March 3, 1887, this was not an open question. It seems clear that under [the fourth section of this act] the jurisdiction of this court is preserved in cases like the present, where the receiver is engaged in winding up the affairs of the national banking association, and invokes the aid of this court in collecting the assets of the bank."

against him necessarily involves the exercise of some of his rights, or the proper discharge of some of his duties, and invokes a consideration of the proper construction and effect of the laws of the United States from which he derives them. For these reasons in contemplation of law every action by or against him arises under the laws of the United States.”³¹

(d.) This certainly is the later rule unless he is barred in cases not involving the adequate amount, \$2,000. Some of the courts insist on this requisite;³² others do not.³³ This question must still be regarded as open until the lower federal courts attain to greater unanimity, or the supreme federal tribunal settles the question for them. In a late case, however, the Circuit Court of Appeals declared that a receiver appointed by the controller of the currency to close up the affairs of an insolvent national bank may sue in the federal courts without regard to his citizenship or the amount in controversy.³⁴

(e.) In actions to recover assessments from stockholders the limitation does not apply; these therefore can be maintained by the federal court regardless of the amount.³⁵

(f.) The state courts are also open to him; thus he has the choice of either.³⁶ But if he should elect to sue in a state

31 *Guarantee Co. v. Hanway*, 104 Fed. 369, 370, citing *Auten v. U. S. Nat. Bank*, 174 U. S. 125; *In re Chetwood*, 165 U. S. 443, 458, 459. In *McDonald v. State*, 41 C. C. A. 278, Caldwell, Cir. J., said of a national bank receiver: “His office is created and his duties defined by an act of Congress. In contemplation of law every action brought by or against him in his official capacity arises under the laws of the United States.”

32 *Bartley v. Hayden*, 74 Fed. 913; *Bock v. Perkins*, 139 U. S. 628; *Thompson v. German Ins. Co.*, 76 Fed. 892 and 77 Fed. 258; *Armstrong v. Ettlesohn*, 36 Fed. 209.

33 *Yardley v. Dickson*, 47 Fed. 835; *Armstrong v. Trautman*, 36 Fed. 275; *Price v. Abbott*, 17 Fed. 506; *Fisher v. Yoder*, 53 Fed. 565. See *Brown v. Smith*, 88 Fed. 565; *Schofield v. Palmer*, 134 Fed. 753.

34 *Aldrich v. Campbell*, 38 C. C. A. (U. S.) 347, citing *Price v. Abbott*, 17 Fed. 506; *Platt v. Beach*, 2 Ben. (U. S.) 303; *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498; *Bank v. Kennedy*, 17 Wall. (U. S.) 19; *Myers v. Hettinger*, 94 Fed. 370.

35 *Brown v. Smith*, 88 Fed. 565.

36 *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 24 C. C. A. 195; *Thompson v. Schaetzl*, 2 S. Dak. 395; *Witters v. Sowles*, 61 Vt. 366;

court, he cannot afterward invoke the aid of a federal tribunal.³⁷

Again, whenever he goes into a state court to enforce a mortgage given to secure the bank, he must be governed by the laws of the state where the land is located in determining the question whether it was given to defraud creditors.³⁸

(g.) The rule that applies to an individual or corporation is not quite so broad. If desirous of suing a bank or its receiver, he has the same choice of a tribunal as the receiver.³⁹ But if he wishes to sue the directors in an action presenting no federal question, for example, in a common law action for deceit, he must resort to a state tribunal.⁴⁰

That a receiver may be sued on a contract made by him on behalf of his estate is unquestioned. Though an officer of the United States, he is not granted immunity from suits, while he is protected by them in the discharge of his official duties.⁴¹

21. Removals to Federal Court.

Can he insist, if he pleases, on the removal of a case against him or the bank, on the ground that he is acting under federal authority? If a bank had no right of removal when solvent, a receiver who is appointed after its insolvency has no greater or stronger right to demand its removal. Says Judge Day: "The effect of the act of 1882 was to place national banks, for the purpose of the jurisdiction of the courts of the United States, upon the same footing as other banking institutions in the state wherein they are located, and to prevent the removal of cases to the federal courts by national banks because of their organization as federal corporations. National banks now have the same right to bring suit in the federal court that any citizen has, and the jurisdiction of the federal court is not

Peters v. Foster, 56 Hun (N. Y.) 607; Platt v. Beebe, 57 N. Y. 339; Fish v. Olin, 76 Vt. 120.

³⁷ Thompson v. Schaetzl, 2 S. Dak. 395.

³⁸ Watts v. Dubois, 66 S. W. (Tex. Civ. App.) 698.

³⁹ See Gerner v. Thompson, 74 Fed. 125.

⁴⁰ Gerner v. Thompson, 74 Fed. 125; Stuart v. Bank, 57 Neb. 569.

⁴¹ Gilbert v. McNulta, 96 Fed. 83.

enlarged in their favor, or right of removal granted to them in actions against them."⁴²

This reasoning is not satisfactory. As the courts have again and again said, a federal bank receiver is dealing from the beginning to the end of his trust with federal law.⁴³ And we think the rule is broad enough to include all actions against the bank or himself as its representative.⁴⁴ But the amount must be sufficient,⁴⁵ and all the parties interested in the suit must join in the application for the removal.⁴⁶

Again, when a cause removed from the state, to the federal court, has been remanded to the state court for want of jurisdiction, the latter should regard the order as conclusive.⁴⁷ As the statute is federal, its construction by the federal courts must prevail. Furthermore, while the proceedings for remanding are in progress, the better practice for a state court is to take no further action until a decision by the federal court has been rendered.⁴⁸

22. Appeals by Receiver.

A receiver cannot appeal from an order or judgment of the court appointing him. Thus a deposit in an insolvent bank was claimed as a trust fund and opposed by the receiver. Having been decided in favor of the claimant, the receiver appealed. This the court of review declared he had no right to do without its permission.⁴⁹

42 Spreckert v. German Nat. Bank, 38 C. C. A. 682, 683.

43 Bartley v. Hayden, 74 Fed. 913; Bock v. Perkins, 139 U. S. 628; Hot Springs School District v. First Nat. Bank, 61 Fed. 417; Sowles v. Witters, 43 Fed. 700; Sowles v. First Nat. Bank, 46 Fed. 513. But see Bird v. Cochrem, 2 Woods (U. S.) 32.

44 Bartley v. Hayden, 74 Fed. 913; Bock v. Perkins, 139 U. S. 628.

45 By the act of March, 1887, the amount to render a case removable was raised from \$500 to \$1,000. Hallam v. Tillinghast, 75 Fed. 849; Follett v. Tillinghast, 82 Fed. 241.

46 Miller v. Le Mars Nat. Bank, 116 Fed. 551.

47 Gerner v. Mosher, 58 Neb. 135.

48 Stuart v. Bank, 57 Neb. 569.

49 First Nat. Bank v. C. Bunting & Co., 7 Idaho 27. Said the court: "The receiver has no personal interest in the judgment from which he ap-

23. Suits By and Against State Bank Receivers.

A receiver of a state bank also has a wide authority in suing and defending. He can sue on a note endorsed in blank in his own unofficial name as endorsee,⁵⁰ though more generally in his official name,⁵¹ or that of the bank.⁵² A receiver can sue as an equitable assignee on a bond executed to his predecessor,⁵³ and a suit in which an order has been made requiring creditors to present their claims to a receiver for adjustment may be revived on a proper bill filed for that purpose.⁵⁴ He can also sue a preferred creditor to recover the property illegally conveyed to him.⁵⁵

Any one who desires to sue a receiver in his official capacity, unless a different rule is prescribed by statute, should first obtain leave of the court that appointed him, which, however, is usually granted unless the lack of any foundation for the request is clearly apparent.⁵⁶ But if an action is instituted against him without obtaining the proper permission, the plaintiff is guilty of contempt of court and will be punished for his temerity.⁵⁷ Possessing such power, it may also compel parties

peals. It is of no personal interest to the receiver whether he pays the money mentioned in the several judgments to the respondent counties, or whether he pays them to the general creditors. It was his duty to obey the order of the court appointing him, of which he is only an agent. He had no right to appeal from its orders." See High on Receivers, §264.

50 Haxtun v. Bishop, 3 Wend. (N. Y.) 13; De Wolf v. Sprague Mfg. Co., 11 R. I. 380.

51 Alderson on Receivers, §562.

52 Chicago Fire-Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 487, and cases cited; Crews v. Farmers' Bank, 31 Gratt. (Va.) 348.

53 Iglehart v. Bierce, 36 Ill. 133.

54 Matter of City Bank of Buffalo, 10 Paige (N. Y.) 378.

55 Industrial Mutual Dep. Co. v. Taylor, 82 S. W. (Ky.) 574; Franklin Nat. Bank v. Whitehead, 149 Ind. 560; National State Bank v. Vigo Co. Nat. Bank, 141 Ind. 352; Mandeville v. Avery, 124 N. Y. 376; Porter v. Williams, 9 N. Y. 142; Meredith Village Sav. Bank v. Simpson, 22 Kan. 414; Leavitt v. Palmer, 3 N. Y. 19; see note, 51 Am. Dec. 333, and High on Receivers, §254.

56 For cases see High on Receivers, §254.

57 Taylor v. Baldwin, 14 Abb. Pr. (N. Y.) 166; De Groot v. Jay, 30 Barb. 483; Thompson v. Scott, 4 Dill. (U. S.) 508.

to actions affecting property in the receiver's custody to proceed nowhere else than in its own forum.⁵⁸ Consequently, after granting permission to sue, the plaintiff should not seek to have the case removed to another jurisdiction; and if he does, this is a sufficient reason for revoking the permit.⁵⁹

On one occasion the plaintiff sought to use the permission to join the receiver in an action as a bridge to pass over into another forum. This was declared to be unfair to the court, for the order was granted that jurisdiction of the controversy might be exercised by the granting power; consequently the order was revoked.⁶⁰

24. Receiver's Report.

A receiver is a special officer of the court and his report, properly verified, is *prima facie* evidence of its correctness. It is therefore entitled to the same consideration as the return of any other officer.⁶¹

25. Settlement Without Appointing a Receiver.

Though the most frequent method is to appoint a receiver, the law is not inhibitory and does not prevent all the creditors, when so inclined, from making a settlement, if they can, among themselves. Perhaps this is now rarely done, but formerly and before the law clearly established and defined the duties of receivers, settlements were thus effected. When done in good faith and with a clear understanding of their rights, creditors had no just cause for complaint.⁶²

58 *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414; *St. Joseph & Denver City Railroad Co. v. Smith*, 19 Kan. 225, 229.

59 *Ibid.*

60 *Ibid.*

61 *State v. Nebraska Sav. & Ex. Bank*, 61 Neb. 495. An audit when ratified and confirmed has the effect of an adjudication in rem, and the distributions contained in it are *res adjudicata*. *Rogers v. Citizens' Nat. Bank*, 93 Md. 613; citing *Thurston v. Devecmon*, 30 Md. 210; *Owings v. Rhodes*, 65 Md. 408; *Taylor v. State*, 73 Md. 208; *Citizens' Land Co. v. Wilson*, 50 Md. 90.

62 *Lewis v. Lynn Institution*, 148 Mass. 235.

26. Authority of Agent Appointed to Settle Bank's Affairs.

Sometimes the stockholders of an insolvent bank appoint an agent, who is commissioned by the controller to settle its affairs. He takes the place of the receiver, is one under another name, a quasi public officer, whose appointment cannot be collaterally assailed.⁶³

The federal courts have the same jurisdiction of suits by and against him as they have in suits by and against a receiver; "indeed," in the words of the court, "the agent is only the receiver under another name."⁶⁴ And an action may be removed into the federal courts by him for the same reason.⁶⁵

27. Authority of Savings Bank Managers to Wind Up Their Bank.

While the managers of a savings bank may proceed for good reasons to wind up the institution they must act broadly, honestly and not in a narrow, selfish manner. Their unwillingness or disinclination to serve is no reason for dissolving, for they may resign or appoint others. And if they seek to dissolve the bank because it is a competitor for deposits with another bank in which they have a larger or more direct personal interest, they may be restrained from thus destroying the bank.⁶⁶

28. Receiver's Appointment and Action Does Not Affect the Statute of Limitations.

The appointment of a receiver does not affect in any way the running of the statute of limitations.⁶⁷ Payment by him

63 Chetwood v. California Nat. Bank, 113 Cal. 649; M'Conville v. Gilmour, 36 Fed. 277. The appointment of such an agent does not terminate the existence of the bank, though it restricts its transactions. United States v. Jewitt, 84 Fed. 142, 143.

64 McConville v. Gilmour, 36 Fed. 277; Guarantee Co. v. Hanway, 104 Fed. 369; George v. Wallace, 135 Fed. 286, 291, also Snohomish County v. Puget Sound Nat. Bank, 81 Fed. 518.

65 Ibid. Weeks v. International Trust Co., 125 Fed. 370.

66 Barrett v. Bloomfield Sav. Institution, 64 N. J. Eq. 425. The attorney-general, or one or more depositors may begin the proceedings. Ibid.

67 Kirkpatrick v. McElroy, 41 N. J. Eq. 539, 555; In re Leiman, 32 Md. 225; High on Receivers, §§135, 184; Wood on Limitations, §202; 46 Cent. L. Jour. 493.

does not revive a debt as would such action by the debtor;⁶⁸ nor is a debt barred by the afflux of time after his appointment. An assignee or trustee cannot plead the statute, and the analogy between his authority and that of a receiver in this regard is correct.⁶⁹

29. Removal of Receiver.

As a national bank receiver is appointed by the controller of the currency, and is his instrument for administering the affairs of an insolvent bank, "the power of appointment carries with it the power of removal."⁷⁰

68 Ibid.

69 Ex parte Ross, 2 Glyn & J. (Eng.) 330; In re General Rolling Stock Co., L. R. 7 Ch. App. (Eng.) 646; Richmond v. Irons, 121 U. S. 27; McDonald v. State, 41 C. C. A. 278. See Minot v. Thatcher, 7 Met. (Mass.) 348; In re Leiman, 32 Md. 225.

70 Kennedy v. Gibson, 8 Wall. (U. S.) 498, 505.

CHAPTER XXXI.

PRESENTATION AND ADJUSTMENT OF CLAIMS.

1. Time for presenting claims. 2. Rights of all creditors are fixed by the assignment. 3. And are to be considered as of that date. 4. Suits for determining amount due. 5. What claims are included. 6. Recovery on assigned claim. 7. Interest. <ul style="list-style-type: none">a. Time it runs.b. On preferred claims.c. On trust claims.d. Dividends.e. On claims of bank temporarily suspended.f. On alternative claim that may be pursued independently.g. On claim of public officer.h. When allowance of interest may be changed. 8. Priority of claim. <ul style="list-style-type: none">a. Who have not.b. Savings banks deposits in another bank.c. Deposits secured by collaterals.d. Deposits in a failed, consolidated or reorganized bank. 9. Savings bank deposits. 10. Set-off in savings bank. 11. Scaling deposits.	12. Separating individual and public deposits. 13. Effect of allowing claim. 14. Claim is not cut off by accepting dividend. 15. Actions to establish claims. 16. Appeals. 17. Mutual claims may be set off. 18. What claims are mutual. 19. Purchase and set off of claim after a bank's failure. 20. Solvent depositor may set off his deposit against his unmatured note held by insolvent bank. 21. Insolvent depositor cannot have his deposit set off against his unmatured note. 22. In some states this can be done. 23. Principle on which rule is founded. 24. An endorser or guarantor can set off his deposit against his liability. 25. Same principles may apply to a bank that is a state depository as to others. 26. Set off of partnership accounts. 27. Set off of deposit against claim secured by collateral. 28. Bank balances. 29. When receiver can enjoin creditor from prosecuting his claim. 30. Claims of non-resident creditors.
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1. Time for Presenting Claims.

After the appointment of an assignee or receiver, one of

his most important duties is to sift the claims, and determine their amount and order of payment. Perhaps in every state a statute fixes the time within which claims must be presented. Of this every creditor should take notice.¹ Nevertheless, liberality has always been shown to claimants, and it was long ago declared that they did not lose their right to participate in the wreck if their claim was presented before distribution.²

Unless positive statute forbids, the courts exercise liberal discretionary authority in extending the period for a good reason,³ especially to a creditor who has not received the notice of presentation; he is often permitted to prove his claim after the time fixed.⁴ Nor is a state barred by such an order from subsequently presenting its preferred claim for taxes.⁵

Of course, the time thus set does not limit the action of the receiver or other body in allowing or disallowing the claims presented.⁶

2. Rights of All Creditors Are Fixed by the Assignment.

The rights of all creditors against the bank, and of the bank itself against them, are fixed at the time of its failure.⁷ What-

1 Accommodation notes executed and delivered to a bank to swell its apparent assets and deceive the bank examiner cannot be collected by the receiver. He has no better title or right thereto than the bank itself. Chicago Title & Trust Co. v. Brady, 165 Ill. 197. A receiver cannot use other assets to pay a collection that must be paid with trust money. Re Assignment of Bank of Oregon, 32 Or. 84; Ferchen v. Arndt, 26 Or. 121; Muhlenberg v. Northwest Loan Co., 26 Or. 132.

2 Belcher v. Wilcox, 40 Ga. 391.

3 People v. Security Life Ins. Co., 79 N. Y. 367; Fourth Nat. Bank v. Scudder, 15 Mo. App. 463. See Alderson on Receivers, §619.

4 Glenn v. Farmers' Bank, 80 N. C. 97; State v. Bank of Commerce, 61 Neb. 22; Williams v. Gibbes, 17 How. (U. S.) 239; Fourth Nat. Bank v. Scudder, 15 Mo. App. 463. See Greeley v. Provident Sav. Bank, 98 Mo. 458.

5 Greeley case, 98 Mo. 458.

6 Bissell v. Heath, 98 Mich. 472.

7 Yardley v. Philler, 167 U. S. 344; Scott v. Armstrong, 146 U. S. 499; Merrill v. National Bank, 173 U. S. 131, 147; Slack v. Northwestern Nat. Bank, 103 Wis. 57; Johnston v. Humphrey, 91 Wis. 76, 80; Darby v. Freedman's Sav. & Trust Co., 3 McArthur (D. C.) 349, 357, 358; Smith v. Brinkerhoff, 6 N. Y. 305; Rothschild v. Mack, 115 N. Y. 9; Fera v. Wickham, 135 N. Y. 225; Pierce v. Bent, 69 Me. 381; Balch v. Wilson, 25 Minn. 297.

ever each then had is preserved ; nothing is lost or gained in the way of rights, liabilities or remedies.⁸ Says the Supreme Court of Wisconsin : "The rights of creditors to proceed by ordinary processes of law against an insolvent corporation to collect their demands exists as fully as though the debtor were an individual instead of a corporation."⁹

"Upon the date of the declared insolvency each creditor becomes the owner, for the purpose of securing his debt, of that part of the assets of the bank which bears the same ratio to the whole property as his debt bears to the aggregate indebtedness ; and this interest in the assets remains fixed and constant until his debt is paid."¹⁰

Neither bank nor depositor can change in any way his relations after the bank's insolvency. Thus a depositor requested his bank to convert his deposit into stock of the company, which was done. After its failure the depositor applied for an injunction to restrain the bank from paying its creditors in a proposed manner on the ground that the conversion above described was a violation of its charter. The court decided that whether the charter authorized the conversion or not he was not entitled to any relief.¹¹

Furthermore, creditors who have presented their claims before the assignee or other proper adjudicating authority are thereby estopped from questioning the validity of the assignment.¹²

3. And Are to be Considered as of That Date.

"The claims of creditors are to be determined as of the date

⁸ *Casey v. La Societe De Credit Mobilier*, 2 Woods (U. S.) 77, revd. 96 U. S. 467; *Hatch v. Johnson Loan & Trust Co.*, 79 Fed. 828; *Yardley v. Clothier*, 2 C. C. A. 349; *Lincoln v. Fitch*, 42 Me. 456; *Bank v. Demmon, Lalor & Denio* (N. Y.) 398, 401; *Salladin v. Mitchell*, 42 Neb. 859; *Receiver of Middle District Bank, v. Paige* (N. Y.) 585; *Nashville Trust Co. v. Bank*, 91 Tenn. 336.

⁹ *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 62.

¹⁰ *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155.

¹¹ *Maryland Sav. Institution v. Schroeder*, 8 Gill & J. (Md.) 93.

¹² *Frelinghuysen v. Nugent*, 36 Fed. 229.

of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities closes, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation, or the realization of a surplus they may be benefited."¹³

4. Suits for Determining Amount Due.

Very often commissioners, auditors, or other special boards or tribunals, are established to determine the validity of claims, the balances due, and other matters pertaining to them. By submitting to the tribunal the claimant waives his objection, if having any, to its constitutionality or irregularity.¹⁴ And its report, unless there be a plain error, is conclusive of the facts pertaining to any claim.¹⁵

Very often suits and a determination by the regular tribunals become necessary to decide what, if anything, is due on the one side or the other. A creditor cannot recover twice, nor two judgments under different forms.¹⁶ Or, if he recovers against an officer, he cannot afterward prove his debt against the bank.¹⁷ And if a bank is seeking to have a deposit set off against a debt due from an insolvent, a court should not order the deposit to be paid to the receiver until the determination of the bank's action.¹⁸

5. What Claims Are Included.

What claims are included? Of course, the claim must be against the bank. Hence a creditor that has made a loan or other contract with an officer of the bank as an individual has

¹³ Fuller, Ch. J., *Merrill v. National Bank*, 173 U. S. 131, 147.

¹⁴ *Dowd v. City Sav. Bank*, 59 N. H. 391.

¹⁵ *Penn Bank's Estate*, 152 Pa. 65.

¹⁶ *Latimer v. Wood*, 73 Fed. 1001.

¹⁷ *Dobson v. Simonton*, 95 N. C. 312.

¹⁸ *Wheaton v. Daily Tel. Co.*, 124 Fed. 61.

no claim against the bank itself.¹⁹ Whether the claim is against the bank or an officer is usually an inquiry simply of fact.²⁰ An officer may prove his claim unless guilty of fraud, like any other creditor.²¹

(a.) The claims against a bank may be divided into two classes: First, claims founded on contract, for the recovery of usury,²² money lent to preserve the bank from insolvency.²³

(b.) Second, claims in the nature of torts. Thus a bank is liable for the consequences of the failure of its officers to transfer stock as requested by the pledgee of a note.²⁴

Claims against a national bank, proved to the satisfaction of the controller, are to be included in the list, also all claims disallowed by him that have been prosecuted and proved in a court having jurisdiction in such cases.²⁵

The claim must be honest; many a claim is disputed on the ground that it is tainted with fraud. Thus a claim for notes purchased by a depositor just before the failure of his bank, paying therefor with his check, was disputed as fraudulent. But their purchase was sustained, the court declaring that the transaction was in good faith. Many claims, like this, are so near the doubtful line that courts cannot easily determine their true character.²⁶

6. Recovery on Assigned Claim.

A claim may be assigned before or after a bank's insolvency, and then presented by the assignee for allowance and payment.

¹⁹ Eastern Township Bank v. Vermont Nat. Bank, 22 Fed. 186. A loan of money borrowed by the president without special authority that was actually received and used by the bank is a valid claim against the bank. Blanchard v. Commercial Bank, 21 C. C. A. 319.

²⁰ In re Insurance Co., 9 Lanc. Bar (Pa.) 119; Duncomb v. New York & Northern R., 84 N. Y. 190.

²¹ Bruyn v. Middle District Bank, 1 Paige (N. Y.) 584.

²² First Nat. Bank v. Denson, 115 Ala. 650.

²³ Fisher v. Adams, 63 Fed. 674.

²⁴ Case v. Bank, 100 U. S. 446; White v. Knox, 111 U. S. 784.

²⁵ Bank of Bethel v. Pahquioque Bank, 14 Wall. (U. S.) 383, 398; Kennedy v. Gibson, 8 Wall. 498, 506.

²⁶ Piening v. Endress, 95 Wis. 242.

But when the price paid is very small, in other words when the disproportion between the price paid and the face value of the claim "is so great as to shock the conscience," the purchaser can recover only the price he paid.²⁷

7. Interest.

(a.) Several questions relating to interest require answer. By the national banking law and by the laws of many states, interest runs on interest-bearing claims until the bank's suspension.²⁸ Nor does a different rule apply to a claim disallowed by a national bank receiver, but afterward established by judicial order; interest does not continue beyond the bank's suspension.²⁹ And if a high rate of interest in the way of penalty is allowed on bank notes that are not paid at the holder's request, and the issuing bank afterward fails, only the usual rate, instead of the higher penal rate will be allowed from the time of demanding payment.³⁰

(b.) On claims possessing some kind of priority, often deposits, whenever payment of the full amount of the principal can be demanded, payment of the interest thereon is an equally imperative obligation from the time of demanding their pay-

²⁷ *Randolph v. Quidneck Co.*, 135 U. S. 457; *Mississippi & M. R. v. Cromwell*, 91 U. S. 643; *Palmer v. Bank*, 72 Minn. 266, 280; first trial, 65 Minn. 90; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; *Thompson v. Meisser*, 108 Ill. 359; *Gauch v. Harrison*, 12 Ill. App. 457. A cashier's check given to a depositor to cover the amount of a withdrawal merely changes the form of the bank's indebtedness, and does not operate as an assignment of the fund as against the receiver. *Clark v. Chicago Title & Trust Co.*, 186 Ill. 440, affg. 85 Ill. 293.

²⁸ *White v. Knox*, 111 U. S. 784; *Richmond v. Irons*, 121 U. S. 27, 64; *Bank Commissioners v. Security Trust Co.*, 70 N. H. 536; *Bank Commissioners v. New Hampshire Trust Co.*, 69 N. H. 621; *People v. Merchants' Trust Co.*, 116 N. Y. App. Div. 41.

²⁹ *Merchants' Nat. Bank v. School District*, 36 C. C. A. 432.

³⁰ *Atlas Bank v. Nahant Bank*, 3 Met. (Mass.) 581. While interest is not payable on the amount due after balancing a pass-book, yet a bank is liable therefor after that date should it become insolvent. *McGowan v. McDonald*, 111 Cal. 57.

ment, if this occurred before the bank's failure; otherwise it begins to run from that event.³¹

(c.) But trust funds that arise by implication, though recoverable whenever they can be traced, do not carry interest. And the reason is that the specific thing only can be recovered. To give the owner more, the excess would be taken from other creditors. To do this would be clear injustice.³²

(d.) Whenever the assets are sufficient, interest is allowed by the national or state law on claims during the period of administration before appropriating the surplus to the stockholders.³³ On a dividend, too, interest may be demanded from the date of the order declaring it when payment has been delayed by unsuccessful litigation on the part of the receiver.³⁴

(e.) Should a bank temporarily suspend, a different rule would apply to its depositors. Interest on them would not begin before demanding payment; its temporary suspension would not work the same result. For, if the bank should prove

³¹ *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437; *Ex parte Stockman*, 70 S. C. 31. In *People v. Merchants' Trust Co.*, 116 N. Y. App. Div. 41, several important questions concerning the payment of interest to depositors were decided, the assets proving to be sufficient for that purpose: (1) That depositors having special interest contracts were allowed interest on them at the agreed rate until the company's insolvency, and afterward at the legal rate until payment of the principal; (2) that general depositors were allowed interest on their deposits from the time of the company's insolvency at the legal rate until paid; (3) that holders of certificates of deposit were allowed interest from the time of the last payment of it, like the first class above mentioned; (4) that the holders of certified checks were entitled to interest at legal rate on the amount of their respective balances from the date of the company's insolvency to the final payment of the principal. Their views were sustained by the Court of Appeals, 187 N. Y. 293. Creditors of an insolvent bank cannot be required, in proving their claims, to allow credit for any collections made after the date of the declared insolvency from collateral securities held by them. *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, revg. 59 Fed. 372.

³² *Merchants' Nat. Bank v. School District*, 36 C. C. A. 432; *Guignon v. First Nat. Bank*, 22 Mont. 140. For the right to recover interest on a trust fund deposited in an insolvent bank, see *Marion Nat. Bank v. Fidelity Trust Co.*, 10 Ky. L. Rep. 775; Chap. XVI. §21.

³³ *People v. American Loan & Trust Co.*, 172 N. Y. 371; *Chemical Nat. Bank v. Bailey*, 12 Blatchf. 480.

³⁴ *Armstrong v. American Ex. Nat. Bank*, 133 U. S. 433.

to be solvent, it might be inequitable to impose upon the stock-holders the liability to pay interest upon all the deposits.³⁵

(f.) On some occasions a claimant may elect, on the insolvency of a bank, to present his claim to the receiver, assignee or commissioners, or to pursue his remedy regardless of the bank's insolvency. In such a case, if the claimant proceeds independently, he can collect interest from the beginning if his claim was of that nature; if it was not, a deposit for example, he can collect interest from the time of demanding payment, or if none had been made from the date of the bank's suspension, nor need any demand be made to sustain the action in consequence of the bank's insolvency.³⁶

(g.) Generally a public officer cannot retain the interest on a public deposit allowed by the proper officers. But if he has made the public body good for the money deposited, the deposit becomes his own and he can retain the interest.³⁷

(h.) When claims by the national banking law are proved to the satisfaction of the controller, they are as effectively established as though they had been reduced to judgments,³⁸ but the entry of an order, by state law, allowing a claim, does not preclude inquiry into the question of interest at a later date.³⁹

8. Priority of Claim.

Priorities or preferences are often claimed. Formerly, public claims had a priority, especially that of the national government.⁴⁰ Its priority against a national bank has faded away, and there was never any sound reason for its existence.⁴¹ But on such occasions states have often maintained

35 Patten v. American Nat. Bank, 15 Colo. App. 479; Sickles v. Harlem River Bank, 149 N. Y. 332, 335.

36 Watson v. Phoenix Bank, 8 Met. (Mass.) 217.

37 Baker v. Williams Bkg. Co., 42 Or. 213.

38 National Bank v. Mechanics' Nat. Bank, 94 U. S. 437.

39 Baker v. Williams Bkg. Co., 42 Or. 213.

40 Chap. XXIX. §6. United States v. Fisher, 2 Cranch (U. S.) 358; Beaston v. Farmers' Bank, 12 Pet. (U. S.) 102.

41 Cook Co. Nat. Bank v. United States, 107 U. S. 445, revg. 9 Biss. 55.

a priority on their deposits because they were deposited or kept in violation of positive law, thus creating an implied trust and entitling a state to their return if they can be found, or any portion, in the bank at the time of its failure.⁴²

(a.) A general depositor is not entitled to priority over other creditors,⁴³ even though he has presented his check for payment and withdrawn it before the bank's failure by the president's representation of its solvency;⁴⁴ nor a public officer who receives interest on his deposits;⁴⁵ nor a depositor who is acting as a trustee;⁴⁶ nor the holder of a certificate of deposit;⁴⁷ nor the purchaser of a check;⁴⁸ nor the owner of a deposit made for a special purpose, though not to be treated by the bank differently from any other;⁴⁹ nor the executor of an

42 State v. Thum, 6 Idaho, 323, and cases cited; Wolffe v. State, 79 Ala. 201; State v. Midland State Bank, 52 Neb. 1; Kimmel v. Dickson, 5 S. Dak. 221; Barings v. Dabney, 19 Wall. (U. S.) 1. See State v. Bank of the State, 1 Rich. (S. C., N. S.) 63. See Chap. XIII, §9, note 36.

43 Matter of Franklin Bank, 1 Paige (N. Y.) 249; Venner v. Cox, 35 S. W. (Tenn. Ch. App.) 769; Bank of Blackwell v. Dean, 9 Okla. 626; Star Cutter Co. v. Smith, 37 Ill. App. 212; Fletcher v. Sharpe, 108 Ind. 276; Paul v. Draper, 158 Mo. 197; Schmelling v. State, 57 Neb. 562; Bruyn v. Middle District Bank, 9 Cow. (N. Y.) 413, note; Bruyn v. Receiver of Middle District Bank, 1 Paige (N. Y.) 584; Marr v. Bank, 4 Cold. (Tenn.) 471; Robinson v. Gardinen, 18 Gratt. (Va.) 509. For more cases see elaborate notes, 19 Am. Dec. 418, 429, 431, and 86 Am. St. Rep. 777. Such a deposit is a priority in Iowa, State v. Corning State Bank, 103 N. W. 97.

44 See Chap. VI, §9f.

45 McNulta v. West Chicago Park Commrs., 40 C. C. A. 155.

46 Fletcher v. Sharpe, 108 Ind. 276; McAfee v. Bland, 11 S. W. 439; Cavin v. Gleason, 105 N. Y. 256; Akin v. Williamson, 35 S. W. (Tenn.) 569. See Beard v. Pella City Independent District, 31 C. C. A. 562. In re Western Marine Ins. Co., 38 Ill. 289. Whether under the Cal. statute a person is a depositor and entitled to a priority, or a lender, and therefore a sharer with the general creditors, see Murphy v. Pacific Bank, 119 Cal. 334.

47 People v. St. Nicholas Bank, 77 Hun (N. Y.) 159, 169; Bayor v. American Trust & Sav. Bank, 157 Ill. 62.

Contra.—Moseby v. Williamson, 5 Heisk. (Tenn.) 278.

48 In re Smith, 15 N. Bank Reg. 459.

49 Italian Fruit & Imp. Co. v. Penniman, 100 Md. 698. Brandywine Bank's Assigned Estate, 1 Chester Co. (Pa.) 431. See Parkesburg Bank's Appeal, 6 Pa. Week. Notes, 394; In re Smart, 136 Fed. 974.

estate who buys the stock of a bank, of which he is president, contrary to law, and resells it shortly before its failure;⁵⁰ nor the drawer of a check who pays it after the failure of the drawee bank,⁵¹ nor the holder of a check or draft;⁵² nor the holder of a draft drawn by an insolvent bank on another bank in exchange for a check drawn on itself;⁵³ nor an agent who deposits his principal's money in his own name, though notifying the bank of its true ownership;⁵⁴ nor the holder of a check issued,⁵⁵ or certified⁵⁶ by a cashier.

Lastly, a bank acting as a trustee of a fund mingled with its general deposits is not entitled to a priority over other creditors.⁵⁷

These priorities, or denials, often turn on the construction of statutes, or other regulations. Many of the attempts to establish priorities have failed; of late years the most successful contentions have been in establishing implied trusts which have been fully considered in another chapter.⁵⁸

(b.) In some states savings bank deposits, put in another bank that fails, constitute a priority;⁵⁹ also deposits transferred to a trustee and secured by collaterals;⁶⁰ and the de-

50 *In re Columbian Bank*, 147 Pa. 422.

51 *Romanski v. Thompson*, 11 So. (Miss.) 828.

52 The holder of a draft or check whose maker fails before its presentation has no preference over other creditors to payment from the maker's funds. *Grammel v. Carmer*, 55 Mich. 201. See Chap. XVII. §8, note 39.

53 *Citizens' Bank v. Bank of Greenville*, 71 Miss. 271; *People v. Merchants' & Mech. Bank*, 78 N. Y. 269; *Citizens' Nat. Bank v. Dowd*, 35 Fed. 340. See Chap. XVIII. §10.

54 *Henry v. Martin*, 88 Wis. 367.

55 *Harrison v. Wright*, 100 Ind. 515; *Clark v. Chicago Title & Trust Co.*, 57 N. E. (Ill.) 1061, affg. 85 Ill. App. 293.

56 *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159.

57 *Lebanon Trust & Safe Dep. Bank's Assigned Estate*, 166 Pa. 622.

58 Chaps. XIII. §9, XVI. §9.

59 *In matter of Patterson*, 78 N. Y. 608, affg. 18 Hun 221; *Rosenback v. Manuf. & Builders' Bank*, 69 N. Y. 358; *Upton v. N. Y. & Erie Bank*, 13 Hun (N. Y.) 269; *Elmira Sav. Bank v. Davis*, 142 N. Y. 590; *Sixpenny Sav. Bank v. Stuyvesant Bank*, Fed. Cases No. 12, 919.

60 *Ward v. Johnson*, 95 Ill. 215.

posits of a savings bank secured by a capital.⁶¹ But a loan on time or call by a savings bank to another bank that fails has no priority.⁶²

(c.) A deposit may be secured by bonds or collateral, as is often done by public officers; indeed, such action often is required. These may be properly applied for the purpose intended and any surplus that may remain becomes a part of the general fund for other creditors.⁶³

(d.) Lastly, are preferences growing out of unsuccessful reorganization schemes. Among these may be mentioned a solvent bank which turned over its assets to another incorporated bank that was to pay its creditors and stockholders. Before completing the work it failed. A creditor of the first or liquidating bank had a prior lien on the assets as against the creditors of the purchasing bank.⁶⁴

9. Savings Bank Deposits.

On the failure of a savings bank several peculiar questions arise. The first question relates to special depositors, are they entitled to a preference? The courts are divided in their an-

61 *Murphy v. Pacific Bank*, 119 Cal. 334. See also *Laidlaw v. Pacific Bank*, 137 Cal. 392.

Contra.—*Fox's Appeal*, 93 Pa. 406.

62 *Rosenback v. Manuf. & Builders' Bank*, 69 N. Y. 358. Nor is a loan changed into a deposit by reason of the lack of authority of the managers to make it. *Ibid.*

63 *Richards v. Osceola Bank*, 79 Iowa 707; *Ward v. Johnson*, 95 Ill. 215. See Chaps. XIII. §9, XVI. §9.

64 *White v. Commercial & Farmers' Bank*, 53 S. E. (S. C.) 614. While a bank was in the possession of a receiver, some of the creditors and depositors agreed to a reorganization scheme, which was accepted by the court and the receiver was dismissed. A different name was adopted, but the bank continued under the old charter. The scheme failed and it was again put in the hands of the receiver. In the distribution of its assets, as these were not sufficient to pay all, the depositors who were not parties to the reorganization were entitled to priority over the other depositors. This was on the ground that a portion of the bank's assets had been thus wasted, a loss which ought to be borne by those who had incurred it. *Rumble v. Tyus*, 123 Ga. 295.

swer. Those which maintain priority⁶⁵ rest their decision on a different conception of a savings bank from that of their opponents. General depositors are regarded as the owners, in some degree are likened to the stockholders of a bank possessing a capital.⁶⁶ Thus regarding a savings institution, special depositors are somewhat like the general depositors in a capital bank, who must be paid before the stockholders can take anything themselves.⁶⁷ Their deposit is of the nature of a loan.⁶⁸

By the opposing view all creditors share alike. "The other creditors of the corporation have no superior equity to the depositors to payment in case of deficiency of assets. . . The statutes certainly do not contemplate that the rights of depositors shall be inferior to those of other creditors."⁶⁹

We think the former conception of a savings bank is more generally maintained. Whether one regard the institution from the point of view of the depositors or the trustees, those who are employed, or sell supplies, or lend money, or render other services are related to it quite differently from the de-

65 Cogswell v. Rockingham Sav. Bank, 59 N. H. 43; Simpson v. City Savings Bank, 56 N. H. 466; Abbott v. Wolfeborough Sav. Bank, 68 N. H. 290; Bunnell v. Collinsville Sav. Society, 38 Conn. 203; Osborn v. Byrne, 43 Conn. 155.

66 Cogswell v. Rockingham Sav. Bank, 59 N. H. 43.

Contra.—Stockton v. Mech. & Laborers' Sav. Bank, 32 N. J. Eq. 163. "A depositor in a savings bank becomes a creditor of the bank, although the promise of the bank is not a promise to pay in full at all events. In some aspects, the depositors must be regarded as cestuis que trust, and the bank as a trustee." Dickinson v. Leominster Sav. Bank, 152 Mass. 49, 52, citing Reed v. Home Sav. Bank, 130 Mass. 443; Lewis v. Lynn Institution, 148 Mass. 235, 245; People v. Mechanics & Traders' Sav. Institution, 92 N. Y. 7.

67 Cogswell case, 59 N. H. 43; Keene v. Collier, 1 Met. (Ky.) 415; Franklin Bank case, 1 Paige (N. Y.) 249. And they must be paid in full even though they were received without authority. Abbott case, 68 N. H. 290. In Iowa, by Code §1841, a savings bank may receive a special deposit for safe keeping. Sherwood v. Home Sav. Bank, 109 N. W. (Iowa) 9.

68 Ibid.

69 People v. Mech. & Traders' Sav. Institution, 92 N. Y. 7; Cogswell v. Rockingham Sav. Bank, 59 N. H. 43; Stockton v. Mech. & Laborers' Sav. Bank, 32 N. J. Eq. 163.

positors. These services are all based strictly on contract and are to receive a fixed reward, whatever it may be; if the relation between the general depositors and the bank also be that of contract, debtor and creditor, the reward is not fixed, uncertain, depending in part on the expenses of management, rent and other outgoes. It is implied and expected in the conception and conduct of the institution that these charges will be paid before there shall be any division of the profits.

Are the debts and expenses incurred in carrying on the ordinary business of the bank to be preferred, or do they fall into the class with the general depositors? In some states they are preferred,⁷⁰ in others not.⁷¹ Of course, the expense of settling the affairs of the bank are to be paid before any division of the assets.⁷²

The checks given to depositors that were not drawn are not preferred,⁷³ but a different rule applies to the holder of a check who has paid the bank money therefor.⁷⁴ As his money went into the funds of the bank, it should be preferred.

10. Set-Off in Savings Bank.

Can a general savings bank depositor set off his deposit against a note or other claim the bank may have against him? Very often a depositor is also a borrower and has pledged land or other property as security. Courts that maintain the theory that savings bank depositors are to be likened to stockholders in a capital bank should refuse to admit a set-off, because the two debts are obviously not mutual. A capital bank stockholder cannot have his stock set off against a note he owes the bank. Accordingly, it is generally held that a savings bank depositor cannot have his deposit set off against his indebtedness.⁷⁵

70 People v. Mechanics & Traders' Sav. Institution, 92 N. Y. 7.

71 Cogswell v. Rockingham Sav. Bank, 59 N. H. 43.

72 Ibid.; U. S. Rev. Stat. §5238.

73 Stockton v. Mechanics & Laborers' Sav. Bank, 32 N. J. Eq. 163.

74 Ibid.

75 Hall v. Harris, 59 N. H. 71, 73; Osborn v. Byrne, 43 Conn. 155; Sawyer v. Hoag, 17 Wall. (U. S.) 610; Stockton v. Mech. & Laborers' Sav. Bank, 32 N. J. Eq. 163.

But wherever the conception of a savings bank is held that its general depositors ought to fare as well as any other class of creditors, of course, set-off of their deposits against their notes or other obligations owing to the bank are allowed.⁷⁶

On the other hand, it is in harmony with the capitalistic conception of a savings bank to hold that a special depositor can set off his deposit against his debt to the bank.⁷⁷

Does this rule apply between depositors and savings banks that become insolvent? In New York the affirmative view is maintained;⁷⁸ in New Jersey the other.⁷⁹ It is true that "a savings bank is a quasi charitable and purely benevolent institution." Justice Green has therefore declared that "to allow the set-off to be made would give an unjust preference to debtor depositors over all the others."⁸⁰

11. Scaling Deposits.

In some states laws provide for scaling the deposits of savings banks that become insolvent, in order to divide the loss equitably among the depositors. The accounts are reduced to equal the value of the assets, and these are divided among the depositors according to the accounts as reduced. By such a reduction the rights of depositors are not concluded nor affected.⁸¹ This legislation has been strongly assailed as retroactive and violative of constitutional law.⁸² In truth, it affects the remedy only and therefore is within the law-making power.

12. Separating Individual and Public Deposits.

Sometimes the deposit of a creditor is composed partly of individual, and partly of public or trust funds. In such cases

⁷⁶ Robinson v. Aird, 43 Fla. 30.

⁷⁷ Hall v. Harris, 59 N. H. 71. See §9.

⁷⁸ New Amsterdam Sav. Bank v Tartter, 54 How. Pr. 385.

⁷⁹ Hannon v. Williams, 34 N. J. Eq. 255.

⁸⁰ Ibid. 258.

⁸¹ Frantestown Sav. Bank case, 63 N. H. 138. See Bunnell v. Collinsville Sav. Society, 38 Conn. 203.

⁸² Simpson v. City Sav. Bank, 56 N. H. 466.

a separation is made, and the private part is applied to his individual indebtedness if he be a debtor.⁸³

13. Effect of Allowing Claim.

The finality of the action of the receiver, assignee, auditor, commissioner or other adjudicating body in allowing or disallowing a claim is regulated largely by statute. Their certificate allowing a claim does not merge, satisfy or change in any manner the claim itself.⁸⁴

14. Claim is Not Cut Off by Accepting Dividend.

A depositor is not estopped by accepting dividends on part of his claim from suing on the part disallowed.⁸⁵ Nor will the allowance or payment on a claim of a higher order, for example, a claim impressed with a trust, convert the beneficiary into a general creditor and prevent him from pursuing the trust fund.⁸⁶

15. Actions to Establish Claims.

An action to establish the validity of a claim may be brought against both the insolvent bank and the receiver, or against either. If it be against the receiver only, or jointly with the bank, he may be ordered by the court to recognize the claim and provide for its payment with the other claims. In no case is mandamus a proper remedy to employ against the receiver to compel the payment of a claim. And if he refuses to pay,

83 *Comfort v. Patterson*, 2 Lea (Tenn.) 670.

84 *Warrensburg Building Assn. v. Zoll*, 83 Mo. 94. A bank just before its failure drew a draft in favor of A which was protested, afterward endorsed by A to B, who had notice of the bank's assignment. It was not an obligation which the assignee was bound to accept in payment of a claim against *A. Shryock v. Brashore*, 11 Phila. 565. A depositor who has a right of action against an insolvent bank does not deprive himself of it by presenting his claim to the bank's receiver or commissioners so long as he retains the evidence of his demand and they do not agree to pay him a dividend. *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217.

85 *Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 82; *Sperry v. Gallagher*, 77 Iowa 107; *Little v. Sturgis*, 127 Iowa 298. See *Warrensburg Building Assn. v. Zoll*, 83 Mo. 94.

86 *City of Larned v. Jordan*, 55 Kan. 124.

there is no occasion for resorting to equity for relief, for an action at law is effective to enforce all of a creditor's rights.⁸⁷

As the receiver is an officer of the court he should permit an issue to be framed between himself and the creditor for determining the validity of his claim, instead of requiring him to sue the insolvent bank.⁸⁸

An order by a court of competent jurisdiction passing on the validity of a claim in favor of, or against an insolvent bank is a final determination, unless an appeal therefrom is taken, and cannot afterwards be questioned by the parties to the proceeding.⁸⁹

16. Appeals.

Statutes provide for appeals or other remedies from the decisions of receivers, commissioners or other bodies dealing with the determination of the claims of creditors. And a creditor of an insolvent national bank who has established before any court of competent jurisdiction his claim, which the receiver continues to reject, "is clearly entitled to some remedy to enforce his right."⁹⁰ But he cannot compel the receiver to act by mandamus.⁹¹ His remedy, however, is adequate. The court that rendered judgment may direct the receiver to

87 Denton v. Baker, 24 C. C. A. 476. A creditor may sue in a court where insolvency proceedings are pending for the recognition and determination of his claim. Gaillard v. Citizens' Bank, 11 Rob. (La.) 168. It is needless for a creditor of an insolvent bank to demand payment of his claim before suing. Parker v. Adams, 38 N. Y. Misc. 325; Barnes v. Arnold, 169 N. Y. 611, affg. 45 App. Div. 314, affg. 23 Misc. 197. In California an action may be maintained by a creditor against the directors in their own name, who still have charge of the bank's affairs under the supervision of the bank commissioners, or under the corporate name on a claim disallowed by them, "for it is a duty imposed upon them by the very nature of their trust to allow all just claims." Argues v. Union Sav. Bank, 133 Cal. 139, 142.

88 Citizens' Sav. Bank v. Person, 98 Mich. 173.

89 Baker v. Williams Bkg. Co., 42 Or. 213; Rockwell v. Portland Sav. Bank, 35 Or. 303; Standley v. Hendrie Mfg. Co., 25 Colo. 376; Grant v. Superior Court, 106 Cal. 324.

90 Denton v. Baker, 48 U. S. App. 235, 244. See Chap. XXX. §22.

91 Ibid.

recognize the claim and to provide for its payment, or certify it to the controller.⁹²

On the other hand, a creditor who voluntarily submits his claim to the determination of a commissioner who, by statute, is endowed with final authority to determine its validity waives his right to question the constitutionality of the statute.⁹³

17. Mutual Claims May be Set Off.

Mutual claims that are due bank and depositor may be set off against each other.⁹⁴ The bank's authority to do this is transmitted to the receiver,⁹⁵ while the depositor's defences are not impaired by the bank's insolvency.⁹⁶ It was once contended that by the national banking law a deposit or other debt due by a national bank to a creditor was a preference and could not be set off against his indebtedness;⁹⁷ this is within the law.⁹⁸ It need hardly be remarked that in determining the merits of

92 Case v. Bank, 100 U. S. 446.

93 Dowd v. City Savings Bank, 59 N. H. 391.

94 Fisher v. Hanover Nat. Bank, 12 C. C. A. 430; Durkee v. National Bank, 102 Fed. 845; Wheaton v. Daily Tel. Co., 124 Fed. 61; Nix v. Ellis, 118 Ga. 345; Finnell v. Nesbit, 16 B. Mon. (Ky.) 351; Salladin v. Mitchell, 42 Neb. 859; Matter of Van Allen, 37 Barb. (N. Y.) 225; Butterworth v. Peck, 5 Bos. (N. Y.) 341; New Amsterdam Bank v. Tartter, 54 How. Pr. (N. Y.) 385; Seymour v. Dunham, 24 Hun (N. Y.) 93; Ellis v. First Nat. Bank, 22 R. I. 565; Little v. Sturgis, 127 Iowa 298. The same rule applies to claims due to and from the State. Commonwealth v. Phoenix Bank, 11 Met. (Mass.) 129.

95 Homer v. National Bank, 140 Mo. 225 and cases cited; Hade v. McVay, 31 Ohio St. 231; Clots v. Bently, 5 Alb. L. J. 286; Scott v. Armstrong, 146 U. S. 499; Smith v. Felton, 43 N. Y. 419; Clarke v. Hawkins, 5 R. I. 219; Davis v. Industrial Mfg. Co., 114 N. C. 321.

96 Moise v. Chapman, 24 Ga. 249; State v. Brobst, 94 Ga. 95, 97; Nix v. Ellis, 118 Ga. 345; Matter of Middle District Bank, 1 Paige (N. Y.) 585; Miller v. Franklin Bank, 1 Paige 444; New Amsterdam Sav. Bank v. Tartter, 54 How. Pr. (N. Y.) 385 and cases cited; Nashville Trust Co. v. Bank, 91 Tenn. 336.

97 Venango Nat. Bank v. Taylor, 56 Pa. 14.

98 Scott v. Armstrong, 146 U. S. 499; Armstrong v. Warner, 49 Ohio St. 376; Snyder's Sons Co. v. Armstrong, 37 Fed. 18; Yardley v. Clothier, 2 C. C. A. 349, affg. 49 Fed. 337; Hade v. McVay, 31 Ohio 231, 238.

opposing claims the receiver and all who pass upon them must act in good faith.⁹⁹

The right of set-off must have existed at the time of the bank's insolvency in order to be exercised.¹

18. What Claims Are Mutual.

By no rule can the question ever be fully answered, what claims are mutual. "A court of equity in cases of insolvency will regard the real parties in interest."² Only the direct and ascertained indebtedness of depositors can be set off against their claims.³

In determining who are the real parties, courts seek to look at the facts in no narrow technical way. Thus a church borrowed money of a banker on the note of several members which for a worthy purpose was deposited in the name of A, one of them. The banker failed, owing money to A, though really to the church. This was allowed as a set-off against the sum A, as representative of the church, owed the banker.⁴ In another case a firm having become embarrassed, continued their deposits in the name of their bookkeeper, though many of them in truth belonged to others. The firm made a note, and when it became due the bank applied the deposits thus made by the bookkeeper in payment. This could not be legally done because they did not belong to the firm.⁵ Had the proceeds of the note been for the bookkeeper's benefit, in other words, a part of the general business, doubtless the set-off would have been allowed.

⁹⁹ *In re Van Allen*, 37 Barb. (N. Y.) 225.

¹ In making a set-off a bank will prevail that makes a rightful application of a debtor's balance on a given day over a bank examiner that closed the doors of the bank an hour afterward. *Fisher v. Hanover Nat. Bank*, 2 C. C. A. 430.

² *Hughes v. Trahern*, 64 Ill. 48, 53.

³ A depositor in an insolvent bank can have his deposit set off against his unpaid subscription for stock. *Humboldt Safe Dep. Co. Estate*, 3 Pa. Co. Ct. 621; also his dividend thereon. *Ibid.*

⁴ *Third Swedish Church v. Wetherell*, 43 Ill. App. 414.

⁵ *Falkland v. St. Nicholas Nat. Bank*, 84 N. Y. 145.

As the Supreme Court of Ohio has remarked: "Generally equity will enforce the right of set-off by decreeing the compensation of mutual demands, so far as they equal each other, where they have grown out of the same or connected transactions, or the one has formed, in whole or in part, the consideration of the other, and the party against whom the set-off is asserted is insolvent."⁶ Thus a bank received a check drawn on another bank in payment of its draft, but which in consequence of its insolvency was not paid. In an action by the receiver against the buyer of the draft to recover the amount of the check, which had not been paid, the amount of the draft was rightfully set off against the buyer's liability on the check.

Another illustration may be given to show that the law seeks to look at the substance of things. A bank paid the debts of a depositor, he giving his note therefor, to which his deposit was to be applied in payment as soon as the amount could be adjusted. The failure of the bank before completing the adjustment did not prevent the application.⁷

19. Purchase and Set Off of Claim After a Bank's Failure.

On the other hand, while creditors may assign their claims after a bank's insolvency,⁸ they cannot by so doing impair the receiver's defence.⁹ Therefore, with few exceptions, no claim

6 Armstrong v. Warner, 49 Ohio St. 376, affg. 21 Week. L. Bull. 136, which see for a valuable discussion of the law of set-off.

7 Chase v. Petroleum Bank, 66 Pa. 169. The holder of a check drawn by another party before the failure of the bank cannot set it off against his debt to the institution. Northern Trust Co. v. Rogers, 60 Minn. 208; Case v. Henderson, 23 La. Ann. 49. See Chap. XXV. §§4; 5.

8 Davis v. Industrial Mfg. Co., 114 N. C. 321.

9 Ibid; Merchants' Ex. Bank v. Fuldner, 92 Wis. 415; Conroy v. Dunlap, 104 Cal. 133; Crane v. Pacific Bank, 106 Cal. 64. In an action by the receiver of an insolvent bank against the maker of a note he cannot defend by way of partial accord and satisfaction that it had been agreed while the bank was in an active condition to take his stock at an agreed price or allow him credit therefor on his indebtedness to the bank. Clarke v. Hawkins, 5 R. I. 219. An insolvent bank depositor after its assignment became the possessor of collateral securities belonging to the bank and collected

against either a national or state bank can be purchased by a debtor after a bank's declared insolvency, even before the appointment of a receiver,¹⁰ and presented as a set-off against his indebtedness.¹¹ Nor can a debtor have set off a check drawn in his favor by another depositor, but not presented for payment until after the assignment.¹² In like manner, should the bank, its assignee or receiver assign a note due to it, the maker's defence would not be impaired.¹³ And if a set-off is demanded in some cases, at least, the demander must prove that he acquired his claim before the bank's failure.¹⁴

enough thereon to become a debtor to the bank. Nevertheless he could not set off his deposit against his indebtedness to the bank. *Storts v. Mills*, 93 Mo. App. 201.

¹⁰ *Davis v. Knapp*, 92 Hun (N. Y.) 297; *Snyder's Sons Co. v. Armstrong*, 37 Fed. 18, 21.

¹¹ *Scott v. Armstrong*, 146 U. S. 499; *Stone v. Central Mich. Sav. Bank*, 96 Mich. 514, citing many cases; *Venango Nat. Bank v. Taylor*, 56 Pa. 14; *Jordan v. Sharlock*, 84 Pa. 366; *Bank v. Spangler*, 32 Pa. 474; *Mountain City Bkg. Co. v. Moyer*, 3 Kulp (Pa.) 307; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660; *Finnell v. Nesbit*, 16 B. Mon. (Ky.) 351, 354; *Receiver of Middle District Bank*, 1 Paige (N. Y.) 585; *Van Dyck v. McQuade*, 85 N. Y. 616; *Schlesinger v. Goldberg*, 93 N. Y. Supp. 592; *Clarke v. Hawkins*, 5 R. I. 219; *Colt v. Brown*, 12 Gray (Mass.) 233; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321; *In re Hamilton*, 26 Or. 579; *Dyer v. Sebrell*, 135 Cal. 597; *Robinson v. Aird*, 43 Fla. 30. A bank is not required to deliver to the receiver of an insolvent depositor who is indebted to the bank on a matured note his deposit to hold during the settlement of his estate. The bank can retain the deposit and apply it on his debt. *Wheaton v. Daily Tel. Co.*, 124 Fed. 61.

Contra.—*Beers v. Hussey*, 1 Bailey Eq. (S. C.) 168; *Nix v. Ellis*, 118 Ga. 345, containing a strong argument for the contrary view. A debtor cannot procure the assignment of a certificate of deposit and have it applied against his own indebtedness. *Oyster v. Short*, 177 Pa. 589.

¹² *Case v. Marchand*, 23 La. 60; *Case v. Henderson*, 23 La. 49; *Farmers' Dep. Nat. Bank v. Penn Bank*, 123 Pa. 283; *Greenebaum v. American Trust & Sav. Bank*, 70 Ill. App. 407; *Northern Trust Co. v. Rogers*, 60 Minn. 208; *Butterworth v. Peck*, 5 Bos. (N. Y.) 341.

¹³ *Newberry v. Trowbridge*, 13 Mich. 263; *Little v. Sturgis*, 127 Iowa 298.

¹⁴ *Smith v. Mosby*, 9 Heisk. (Tenn.) 501; *Lanier v. Gayoso Sav. Institution*, 9 Heisk. 506; *Dyer v. Sebrell*, 135 Cal. 597.

Some very close questions occasionally arise when a debt is transferred impending a bank's insolvency, or before the adjudication. Thus a certificate of deposit assigned after a bank's suspension, but previous to the filing of a bill for closing its affairs may be used by the assignee as a set-off, against a debt he owed to the bank.¹⁵ In another case a certificate was similarly used by the assignee who purchased it during the interval between the closing of the issuing bank and its subsequent assignment.¹⁶ Many of these questions turn on statutes.¹⁷

By thus purchasing a claim and setting it off a preference is secured, which, as we have seen, is generally denied. Even in Georgia, where this can be done, the right is withheld from an officer of the failed bank.¹⁸

As the powers of a bank's officers cease after it has assigned, they can buy up claims against the institution like other persons, so long as they do not use their previous knowledge to obtain undue and improper advantages over the bank's creditors.¹⁹

20. Solvent Depositor May Set Off His Deposit Against His Unmatured Note Held by Insolvent Bank.

A depositor may have his deposit set off against paper that has not matured at the time of the bank's insolvency, whether state²⁰ or national,²¹ because the deposit was due at the time

15 Mosby v. Williamson, 5 Heisk. (Tenn.) 278.

16 Johnston v. Humphrey, 91 Wis. 76.

17 For set-off in national bank cases, see Bolles on National Bank Act, §§448, 448a.

18 Nix v. Ellis, 118 Ga. 345. Even in that State the right ceases after filing a petition for appointing a receiver.

19 Craig's Appeal, 92 Pa. 396.

20 Matter of Hatch, 155 N. Y. 401; Smith v. Felton, 43 N. Y. 419; Smith v. Fox, 48 N. Y. 674; Richards v. La Tourette, 119 N. Y. 54; Rothschild v. Mack, 115 N. Y. 1; Colton v. Drovers' Perpetual B. & L. Assn., 90 Md. 85; Salladin v. Mitchell, 42 Neb. 859; Skiles v. Houston, 110 Pa. 254; Jordan v. Sharlock, 84 Pa. 366; Jack v. Klepser, 196 Pa. 187; Northampton Bank v. Balliet, 8 W. & S. (Pa.) 311; Jones v. Piening, 85 Wis. 264; Oatman v. Batavian Bank, 77 Wis. 501; McCagg v. Woodman, 28 Ill. 84; Third Swedish Church v. Wetherell, 43 Ill. App. 414; Smith v. Spengler, 83 Mo. 408; Davis v. Industrial Mfg. Co., 114 N. C. 321; Finnell v. Nesbit,

of the assignment. And the rule covers a time deposit that has not matured at the time of the bank's insolvency.²²

In like manner a depositor, owing a banker who dies insolvent, unmatured paper may have his deposit set off against it, because his control over his deposit was absolute at the time of the banker's death.²³

A depositor must observe the rule at the proper time if he wishes to profit by it. Therefore, if he pays his note without having his deposit set off against it, he cannot afterward insist that he is entitled to more consideration than other creditors.²⁴

21. Insolvent Depositor Cannot Have His Deposit Set Off Against His Unmatured Note.

On the other hand, a solvent bank having unmatured paper at the time of the maker's insolvency cannot set off his deposit

16 B. Mon. (Ky.) 351; Beatty v. Scudday, 10 La. Ann. 404; Stone v. Central Mich. Sav. Bank, 96 Mich. 514, 515; Thompson v. Union Trust Co., 130 Mich. 508; Clarke v. Hawkins, 5 R. I. 219, 224; Wagoner v. Paterson Gas Light Co., 23 N. J. Law 283; Ga. Seed Co. v. Talmadge, 96 Ga. 254; Darby v. Freedman's Sav. & Trust Co., 3 MacArthur (D. C.) 349, 358; Thomas v. Exchange Bank, 99 Iowa 202; Sweetser v. People's Bank, 69 Minn. 196; Becker v. Seymour, 71 Minn. 394, 396; St. Paul & M. Trust Co. v. Leck, 57 Minn. 87; Stolze v. Bank, 67 Minn. 172; National Mahaiwe Bank v. Peck, 127 Mass. 298.

21 Scott v. Armstrong, 146 U. S. 499; Yardley v. Clothier, 2 C. C. A. 349; Snyder's Sons Co. v. Armstrong, 37 Fed. 18; Armstrong v. Warner, 21 Ohio Week. Law Bull. 136; Balbaach v. Frelinghuysen, 15 Fed. 675; In re Meyer, 107 Fed. 86; Adams v. Spokane Drug Co., 57 Fed. 888; Ex parte Howard Nat. Bank, 12 Fed. Cas. No. 6, 764; Platt v. Bentley, 11 Am. Law Reg. 171; Clots v. Bentley, 5 Alb. L. J. 286; Robinson v. Aird, 43 Fla. 30; Mercer v. Dyer, 15 Mont. 317; see Armstrong v. Warner, 49 Ohio St. 376.

Contra.—Stephens v. Schuchmann, 32 Mo. App. 333; Armstrong v. Helm, 13 Ky. L. Rep. 460.

22 Seymour v. Dunham, 24 Hun (N. Y.) 93; Davis v. Industrial Mfg. Co., 114 N. C. 321.

23 Skiles v. Houston, 110 Pa. 254. If a bank, instead of setting off a deposit against a decedent's notes, supposing the estate is solvent, takes others in renewal from the heirs, they are estopped from setting up the mistake or want of consideration as a defence in an action against them. Union & Planters' Bank v. Jefferson, 101 Wis. 452.

24 In re Commercial Bank, 2 Ohio N. P. 170

against it because the paper is not due.²⁵ The status of his creditors, as well as his debtors, is fixed by his assignment. For the same reason, when a depositor's note matures after his death and his estate is insolvent, his deposit cannot be set off against it.²⁶ The rights of creditors became fixed by his death and at that time the depository, or noteholder, had no right of action against his estate.

²⁵ Chipman v. Ninth Nat. Bank, 120 Pa. 86; Dougherty v. Central Nat. Bank, 93 Pa. 227; Manufacturers' Nat. Bank v. Jones, 2 Penny. (Pa.) 377; Beckwith v. Union Bank, 9 N. Y. 211; Martin v. Kunzmuller, 37 N. Y. 396; Bradley v. Seaboard Nat. Bank, 46 N. Y. App. Div. 550, 556; Heidelbach v. National Bark Bank, 87 Hun (N. Y.) 117; Keep v. Lord, 2 Duer (N. Y.) 78; Oatman v. Batavian Bank, 77 Wis. 501; Birmingham Nat. Bank v. Mayer, 104 Ala. 634, 641; Columbia Nat. Bank v. German Nat. Bank, 56 Neb. 803; Ellis v. First Nat. Bank, 22 R. I. 565; Horner v. National Bank, 140 Mo. 225; Kortjohn v. Continental Nat. Bank, 63 Mo. App. 166, but see Knecht v. U. S. Sav. Institution, 2 Mo. App. 563; Henderson v. Michigan Trust Co., 123 Mich. 688; Koegel v. Michigan Trust Co., 117 Mich. 542 and cases cited; Mechanics' Bank v. Stone, 115 Mich. 648.

In Skunk v. Merchants' Nat. Bank, 16 Ohio Week. Law Bull. 353, it was held that a bank could retain from an insolvent depositor's deposit enough to pay his unmatured notes due to the bank, though not against bona fide holders of his checks. A husband and wife executed a trust deed of his property and of her separate estate to secure his note to a bank. It became insolvent having a deposit belonging to her. This was set off against his note. Darby v. Freedman's Sav. & Trust Co., 3 MacArthur (D. C.) 349. A bank that receives a note for collection from a depositor who becomes insolvent afterward, has a lien on the proceeds in payment of notes that matured before his insolvency, but not those maturing afterward. Smith v. Eighth Ward Bank, 31 N. Y. App. Div. 6. A bank sent to B bank a guaranteed note in renewal of another which had been discounted by the B bank for the other's benefit. Afterward the receiver of A bank demanded the balance on account by the B bank, which it vainly sought to set off against the unmatured guaranteed note given by the A bank. Mechanics' Bank v. Stone, 115 Mich. 648. A note given to a savings bank was pledged by it after its insolvency. After this had been declared the note, which was then past due, passed to another bank for antecedent indebtedness, but no part of that indebtedness was thereby paid. The maker was permitted to set off his deposit in the savings bank against the note. Merchant Ex. Bank v. Fuldner, 92 Wis. 415. A due joint note, belonging to an insolvent bank against A and B cannot afterwards be set off in their favor against notes not then due held by them against the bank and other insolvent makers jointly. Balch v. Wilson, 25 Minn. 297.

²⁶ Jordan v. National Shoe & Leather Bank, 74 N. Y. 467; Appeal of

For the same reason, while a landlord's claim against an insolvent bank for the loss sustained from the non-fulfillment of the lease may be unquestioned,²⁷ his right to have this claim set off against a note he owes the bank is denied.²⁸

22. In Some States This Can be Done.

Some jurisdictions hold that the same rule ought to be applied to both classes of cases; in these, the deposit of an insolvent depositor may be set off against his unmatured paper because his insolvency "matures all his debts." · Since the statute of 4th Anne an English creditor whose debt was not due has had a right to prove it and secure a dividend, and, as another has well said, "insolvency has long been recognized as a distinct equitable ground of set-off." Is not the position impregnable, so well stated by the Kentucky Court of Appeals.²⁹ "It would be unconscientious for an insolvent to coerce the payment of his claim from one to whom he is indebted in a larger sum, although the debt of the latter might not be due." Does not this rule rest on the sounder reason? Furthermore, the same rule applies for the benefit of an endorser.³⁰

Farmers' & Mech. Bank, 48 Pa. 57; Bosler v. Exchange Bank, 4 Pa. 32; Beaver v. Beaver, 23 Pa. 167; National Bank v. Gormley, 2 Walk. (Pa.) 493; Kensington Nat. Bank v. Shoemaker, 11 Pa. Week. Notes 215. See Demmon v. Boylston Bank, 5 Cush. (Mass.) 194.

27 McGraw v. Union Trust Co., 135 Mich. 609; People v. St. Nicholas Bank, 151 N. Y. 592; People v. National Trust Co., 82 N. Y. 283; Chemical Nat. Bank v. Hartford Dep. Co., 156 Ill. 522, affd. 161 U. S. 1; Bolles v. Crescent Drug Co., 53 N. J. Eq. 614.

28 McGraw v. Union Trust Co., 135 Mich. 609; Henderson v. Michigan Trust Co., 123 Mich. 688; Koegel v. Michigan Trust Co., 117 Mich. 542.

29 Ky. Flour Co. v. Merchants' Nat. Bank, 90 Ky. 225, 227; Little v. City Nat. Bank, 115 Ky. 629; New Farmers & Traders' Bank v. Crowe, 82 S. W. (Ky.) 287; Ga. Seed Co. v. Talmadge, 96 Ga. 254; Nashville Trust Co. v. Bank, 91 Tenn. 336; Citizens' Bank v. Kendrick, 92 Tenn. 437; Hodgin v. People's Nat. Bank, 124 N. C. 540; Demmon v. Boylston Bank, 5 Cush. (Mass.) 194; see Spaulding v. Backus, 122 Mass. 553; Thomas v. Exchange Bank, 99 Iowa 202; Knecht v. U. S. Sav. Institution, 2 Mo. App. 563; St. Paul & M. Trust Co. v. Leck, 57 Minn. 87; Ford v. Thornton, 3 Leigh (Va.) 695; Schuler v. Israel, 120 U. S. 506; Mathewson v. Strafford Bank, 45 N. H. 105, 108; see note to Camden Nat. Bank v. Green,

A limitation to this rule must be kept in sight wherever the assignment rule prevails. In these states the holder of check has a prior claim to the deposit over the bank holding unmatured paper of the insolvent depositor.³¹ Against others the bank's right of set-off prevails.

And the same rule applies both to the deposits of a partnership and to those of an individual, whether the account is kept in the partnership name and the funds were deposited while the partnership was in life, or in the name of the surviving partner and deposited by him afterward.³²

To establish this rule, that a deposit or other present indebtedness may be set off against notes and other unmatured obligations that the insolvent bank may hold against him, has required many a judicial battle. The confusion is somewhat lessened by excluding the cases in which the claims on neither side were due at the time of the insolvency of one or both parties. In these cases the courts have quite uniformly denied a set-off.³³

23. Principle on Which Rule is Founded.

It will be seen that the application of the principle of set-off

45 N. J. Eq. 546; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Skunk v. Merchants' Nat. Bank*, 16 Ohio Week. L. Bull. 353; *Winslow v. Harriman Iron Co.*, 42 S. W. (Tenn. Ch. App.) 698. See *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381. This view is ably discussed in *Nashville Trust Co. v. Bank*, 91 Tenn. 336 and in *Stewart v. National Security Bank*, 6 Pa. Week. Notes, 399; *Templeman v. Hutchings*, 24 Tex. Civ. App. 1; *Owens v. American Nat. Bank*, 36 Tex. Civ. App. 490, and cases cited; *Neely v. Grayson Co. Nat. Bank*, 25 Tex. Civ. App. 513. And also as against garnishing creditors. *Ibid.*

30 *Nightingale v. Chaffee*, 11 R. I. 609. This is by statute.

31 *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Merchants' Nat. Bank v. Robinson*, 97 Ky. 552. See *Merchants' Nat. Bank v. Ritzinger*, 20 Ill. App. 27; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803.

32 *Hodgin v. People's Nat. Bank*, 124 N. C. 540.

33 *Fera v. Wickham*, 135 N. Y. 223; *U. S. Trust Co. v. Harris*, 2 Bos. (N. Y.) 75; *Fuller v. Steiglitz*, 27 Ohio St. 355; *Myers v. Davis*, 22 N. Y. 489. See *Gibbons v. Hecox*, 105 Mich. 509, and construction of it in *Thompson v. Union Trust Co.*, 130 Mich. 508, 510, and *Mechanics' Bank v. Stone*, 115 Mich. 648, 649. In North Carolina the distinction is disregarded and a set off may be allowed, *Davis v. Industrial Mfg. Co.*, 114 N. C. 321.

to unmatured claims has been extended until it covers a wide field. Many of the decisions are based on statutes, which must also be considered in applying them as precedents.³⁴

The chief objection to the application of the principle has been that it worked a preference, and consequently was opposed to justice. The contrary conviction has strengthened, and so courts and legislatures have widened its application. It is unquestionably true that a bank in discounting a note usually regards the size and worth of the maker's deposit; and the maker, on the other hand, expects the bank to apply his deposit in payment. Thus transactions between bank and customer are mutual dealings, and the securities each possesses when delivering his money, checks, and other property to the other party are taken into account. Is it not just then on the failure of one or both parties to execute their intentions in this respect as fully as may be consistent with general principles?

24. An Endorser or Guarantor Can Set Off His Deposit Against His Liability.

A surety is entitled to the right of set-off in the same manner as his principal.³⁵ Therefore an endorser, surety, or guarantor on a note can set off his deposit against his liability. After this is fixed, he stands in the same position as the maker, and is entitled to the same defence.³⁶ And if there are several en-

34 The set off of bank bills was often denied by statute or decision, partly because it would be so easy for a debtor to procure them at a large discount. *Eastern Bank v. Capron*, 22 Conn. 639; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Clarke v. Hawkins*, 5 R. I. 219.

35 *Darby v. Freedman's Sav. & Trust Co.*, 3 MacArthur (D. C.) 349. The vice-president and attorney of an insolvent bank cannot set off against his note due to it a liability accruing against him as surety on an attachment bond. *Chapman v. Cutrer*, 29 So. (Miss.) 467. The surety on a bond given to secure a deposit on which a judgment has been maintained has no rights over other creditors. *Richards v. Osceola Bank*, 79 Iowa 707.

36 *Newberry v. Trowbridge*, 13 Mich. 263; *Receiver of Middle District Bank, 1 Paige* (N. Y.) 585; *Citizens' Bank v. Kendrick*, 92 Tenn. 437; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336; *Lionberger v. Kinealy*, 13 Mo. App. 4; *Arnold v. Neiss*, 1 Walk. (Pa.) 115.

dorsers each may have his deposit set off against his proportionate part of his liability, the amount of which will depend upon the solvency of the other endorsers.³⁷ But if the endorser is indemnified by the real debtor, or he can be compelled to pay, his deposit will not be set off against his liability.³⁸

The holder of a note, who is surety or endorser, and proves his claim against an insolvent bank, must deduct any sum received from the principal debtor, and the dividend must be on the remaining balance.³⁹ He is not compelled to enforce its collection against the principal before putting in his claim against the insolvent estate.⁴⁰ He can proceed against both parties until his claim is fully paid.⁴¹

Indeed, the rule is more liberal to a guarantor than to the maker of unmatured indebtedness at the time of its failure. In the former case it is allowed, and denied to the latter.⁴²

25. Same Principles Apply to a Bank That is a State Depository as to Others.

The same principles apply to a bank that is a state depository as to others. The other depositors may have their deposits set off against the notes they owe to it, and the state has a lien only on the balance that may be still due from the depository.⁴³

26. Set Off of Partnership Accounts.

Sometimes difficult questions arise in determining what debts shall be set off in partnership matters.⁴⁴ Clearly a re-

³⁷ Davis v. Industrial Mfg. Co., 114 N. C. 321.

³⁸ Receiver of Middle District Bank, 1 Paige (N. Y.) 585.

³⁹ Mercantile Nat. Bank v. MacFarlane, 71 Minn. 497; *In re Babcock, 3 Story (U. S.) 393; Sohier v. Loring, 6 Cush. (Mass.) 537.*

⁴⁰ Mercantile Bank case, 71 Minn. 497.

⁴¹ Ibid. A receiver who pays is subrogated to the holder's rights against all parties. Ibid.

⁴² Kilby v. First Nat. Bank, 32 N. Y. Misc. 370. See Clute v. Warner, 8 N. Y. App. Div. 40.

⁴³ State v. Brobst, 94 Ga. 95. See Seay v. Bank of Rome, 66 Ga. 609.

⁴⁴ See Chap. XXV. §5b.

ceiver has no right to set off a claim due from one member of a firm in his individual capacity against the firm's debt to the bank.⁴⁵ Nor can the debt of a partner and his firm to a bank in equity be set off by the receiver against trust money which the partner has mingled with the firm's deposits without the bank's knowledge.⁴⁶

In another case a banker persuaded a partnership to continue its deposits by representing himself to be the owner of notes made by the chief member of the firm, to the payment of which the deposits might be applied. In equity the application was made.⁴⁷

27. Set Off of Deposit Against Claim Secured by Collateral.

After the failure of a bank, can a depositor who is owing a note secured by collateral insist that his deposit shall be first applied toward its payment? The question is important, for if his deposit were sufficient for that purpose, he would lose nothing; if insufficient, then his collateral only so far as might be required would be devoted and the balance would be returned to him. In a recent case a judge of long service remarked that he would be clearly liable "for the balance which would be due the bank after offsetting the amount of the depositor's balance, upon payment of which the receiver would be required to give up the securities pledged as collateral."⁴⁸

Occasionally a bank pledges a note it has discounted as col-

45 *In re Van Allen*, 37 Barb. (N. Y.) 225. A person gave his note to a bank for money that was to be put into a firm. The cashier was told that the receipts from the firm's sales would be deposited in the bank and applied on the note. The firm was nevertheless not liable for the loan, nor could its deposit be applied on the note. *Kroll v. Union Trust Co.*, 133 Mich. 638. A deposit at the time of a bank's failure belonged to a partnership. Subsequently one of the two partners assigned his interest in the deposit to the other. The assignee could set off this deposit against a note held by the bank of another partnership of which the assignee was a member. *Jack v. Klepser*, 196 Pa. 187.

46 *Knight v. Fisher*, 58 Fed. 991.

47 *Second Nat. Bank v. Hemingray*, 34 Ohio St. 381.

48 *Van Brunt, P. J., People v. St. Nicholas Bank*, 76 Hun (N. Y.) 522, 527.

lateral for a loan; when this is done the right to set off the maker's deposit against it may become impaired. Suppose a depositor has a deposit of \$150 and owes the bank a \$500 note, which has been pledged as collateral. If he or the receiver is obliged to pay, for example, \$400 to obtain the note from the pledgee, he can apply only \$100 of his deposit in discharge of it, and he becomes a creditor of the bank for the remainder of his deposit.⁴⁹

28. Bank Balances.

"Balances due to banks or bankers which are simply the results of mutual accounts between them and the state bank are not entitled to be classed as deposits. Where these balances grow out of either notes, drafts or checks charged and credited in the currency of the business between these banks and the state bank, they do not constitute a deposit in the proper sense of the term as used in the Bank Acts and cannot be preferred."⁵⁰

29. When Receiver Can Enjoin Creditor from Prosecuting His Claim.

The receiver may enjoin a resident creditor of an insolvent bank from prosecuting a suit he has brought in another state hindering him in collecting its assets.⁵¹

30. Claims of Non-Resident Creditors.

By the federal constitution foreign creditors stand on the

⁴⁹ Becker v. Seymour, 71 Minn. 394. Stock pledged as collateral must be released by payment or sale before the owner is entitled to any dividends from the assets. First Nat. Bank v. Riggins, 124 N. C. 534. A bank borrowed securities for use as collateral in borrowing money, which it entered as a deposit to the owner of the securities. Afterward failing, the depositor paid the loan and recovered the securities and then claimed a preference under a law which gave preferences to depositors over other creditors. Parkesburg Bank's Appeal, 6 Pa. Week. Notes 394.

⁵⁰ State Bank Case, 13 Pa. Co. Ct., 433, 438.

⁵¹ Davis v. Butters Lumber Co., 132 N. C. 233; Cole v. Cunningham, 133 U. S. 107.

same plane with creditors of a similar class living in the state where the property of the insolvent bank is administered.⁵² And if any payment has been made to a non-resident creditor, his claim will be postponed until resident creditors have shared in a similar manner.⁵³ In New York, the rights of domestic creditors are still further protected by a bond, given before the assets of a non-resident insolvent bank can be removed out of its jurisdiction, requiring the just and equal distribution of its assets among all creditors wherever living.⁵⁴

52 *Blake v. McClung*, 172 U. S. 239; *Tyler v. Thompson*, 44 Tex. 497.

53 *Bank Commissioners v. Granite State Prov. Assn.*, 70 N. H. 557; *Tyler v. Thompson*, 44 Tex. 497.

54 *People v. Granite State Prov. Assn.*, 161 N. Y. 492.

CHAPTER XXXII.

PAYMENT OF DIVIDENDS.

1. Dividends to stockholders. 2. Dividends to depositors. 3. Dividend to creditor holding collaterals endorsed by the bank. 4. Creditors holding collateral.	5. Dividends to officers. 6. Surplus. 7. Dividends among different classes of stockholders. 8. Dividends by national banks. 9. Order of payments.
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1. Dividends to Stockholders.

After all the assets have been collected and the debts have been ascertained, then a distribution is made in the manner prescribed by statute.

Beginning with the stockholders, they receive nothing until all the bank's debts are paid.¹ And if the stock should be distributed before paying the bank's debts, each stockholder can be compelled to contribute from the sum thus received pro rata to the bank's indebtedness.² This can be done in an equitable proceeding in which all the proper parties may be brought before the court; and the full amount of the bank's debts, the mode of contribution, and the number of contributors as-

¹ *In re Hollister Bank*, 27 N. Y. 393; *Dabney v. Bank*, 3 Rich. (S. C. N. S.) 124; *Pruyn v. Van Allen*, 39 Barb. (N. Y.) 354; *Paschall v. Whitsett*, 11 Ala. 472, 477. A bank has no authority to set off the dividends accruing on the stock of a deceased insolvent stockholder against his note after his death. *Brent v. Bank*, 2 Cranch C. C. (U. S.) 517. A company that was required to give security, by judicial order, for bonds complied by giving the undertaking of the president of a bank. To secure him the company gave him a check on its deposit, taking from him a certificate signed by him for the bank, showing for what purpose the check had been given. The bank having failed, the company was declared to be a creditor, like other depositors, and entitled to the same dividends. The purpose for which the check was given did not change the nature of the deposit. *Hawkins v. Cleveland R. Co.*, 32 C. C. A. 198, revg. 79 Fed. 29.

² *Paschall v. Whitsett*, 11 Ala. 472, 477. See Chap. V. §2.

certained.³ But if they buy up the claims of other creditors, which is sometimes done, they are as much entitled to dividends on them as the original creditors had they retained their ownership;⁴ by purchase and transfer they acquire all the original holders' rights.⁵

Again, a stockholder who is a creditor for money loaned to a bank,⁶ or for a deposit,⁷ or an unpaid dividend properly declared,⁸ is entitled to the same dividends thereon as any other creditor. Whenever a stockholder, whether an officer or not, can make a valid contract with his corporation, it follows that he can enforce it, and if the corporation fails he fares like any other creditor. Says Justice Sample in a well-considered case: "If such stockholders become creditors in good faith during the existence of the corporation, then doubtless they would share pro rata in the distribution of its assets, the same as a non-stockholder creditor."⁹ Lastly, the dividends due on stock follow its ownership.¹⁰

2. Dividends to Depositors.

Depositors are the much larger number of creditors. Those who are liable as drawers or endorsers of notes belonging to the bank cannot share in any dividend until their own liability is discharged.¹¹

3 Ibid.

4 Humboldt Safe Dep. Co.'s Assigned Estate, 3 Pa. Co. Ct. 621. See Craig's Appeal, 92 Pa. 396.

5 City Bank v. Crossland, 65 Ga. 734.

6 Bristol Milling Co. v. Probasco, 64 Ind. 406; Merrick v. Peru Coal Co., 61 Ill. 472.

7 In re Humboldt Safe Dep. Co.'s Assigned Estate, 3 Pa. Co. Ct. 461. See State Bank case, 13 Pa. Co. Ct. 433.

8 Curry v. Woodward, 44 Ala. 305; Lowne v. American Fire Ins. Co., 6 Paige (N. Y.) 482.

9 Schrader v. Heinzelman, 51 Ill. App. 31, 37. A bank stockholder fails owing the institution. It also fails and after paying other debtors, a large dividend is declared in favor of the stockholders. It cannot apply the dividend on the failed stockholder's indebtedness to the bank. Bridges v. National Bank of Troy, 185 N. Y. 146; Merchants' Bank v. Shouse, 102 Pa. 488.

10 Central R. & Bkg. Co. v. Papot, 59 Ga. 342.

11 State Bank of Lock Haven's case, 13 Pa. Co. Ct. 433.

3. Dividend to Creditor Holding Collaterals Endorsed by the Bank.

It is a well-understood rule that if the maker and endorser of negotiable paper becomes insolvent, the holder may prove the full amount of his debt against both estates at the same time and receive from each a full pro rata on that amount, provided the two sums do not exceed the amount of the debt.¹² But a creditor of an insolvent bank is not entitled to be paid by the receiver pro rata dividends on all collateral notes endorsed by the bank and held by the creditor, as well as on the principal debt.¹³

4. Creditors Holding Collateral.

A warm controversy has been waged over the position of creditors holding collateral for their indebtedness. By one rule, known as the bankruptcy rule, a creditor is entitled to the same dividend as if he held no security, which must be sold and the proceeds applied to the payment of his claim. If it is enough, he loses nothing; if after making the application there is an excess this must be delivered to the receiver of the bank who adds it to the general fund.¹⁴

By the other rule, known as the chancery rule, the creditor must sell his security and apply the proceeds on his claim; if there is enough, he loses nothing; if an excess, this is returned

¹² *Citizens' Bank v. Kendrick*, 92 Tenn. 437; *Citizens' Bank v. Patterson*, 78 Ky. 291; *Brown v. Merchants & Farmers' Nat. Bank*, 79 N. C. 244; *Southern Mich. Nat. Bank v. Byles*, 67 Mich. 296; *Miller's Estate*, 82 Pa. 113; *Assignment of Meyer*, 78 Wis. 615; *Sohier v. Loring*, 6 *Cush. (Mass.)* 537. See Chap. XXXI. §27.

¹³ *First Nat. Bank v. Williamson*, 35 S. W. (*Tenn. Ch. App.*) 573.

¹⁴ *Merrill v. Nat. Bank*, 173 U. S. 131; *Third Nat. Bank v. Haug*, 82 Mich. 607; *Southern Michigan Nat. Bank v. Byles*, 67 Mich. 296; *Brough's Estate*, 71 Pa. 460; *Morris v. Olwine*, 22 Pa. 441; *Patten's Appeal*, 45 Pa. 151; *Graeff's Appeal*, 79 Pa. 146; *Furness v. Union Nat. Bank*, 147 Ill. 570; *Kauffman v. Hudson*, 65 Tex. 716; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155; *Findlay v. Hosmer*, 2 Conn. 350; *West v. Bank of Rutland*, 19 Vt. 403; *Levy v. Chicago Nat. Bank*, 158 Ill. 88; *State v. Nebraska Sav. Bank*, 40 Neb. 342; *People v. Remington*, claim of *Ilion Nat. Bank*, 121 N. Y. 328; *Assignment of Meyer*, 78 Wis. 615; *Bank Commissioners v. Security Trust Co.*, 70 N. H. 536; *Atlantic Phosphate Co. v. Law*, 23 S. E. 955. *In re Burke*, 25 R. I. 302, but see *Allen v. Danielson*, 15 R. I. 480, and *Greene v. Jackson Bank*, 18 R. I. 779.

to the receiver; if a deficiency, he receives a dividend on this like other creditors.¹⁵

The chancery rule more generally prevails, though the other has been adopted by the supreme federal tribunal for application to all claims pertaining to national banking associations. Its adoption, however, by a bare majority of one of the entire membership of the court is a fair indication of judicial opinion concerning the merit of both rules.

5. Dividends to Officers.

Officers are entitled to share in the assets for the sum due for their services or money loaned like other creditors.¹⁶

6. Surplus.

If there be a surplus after paying all the debts this belongs to the stockholders.¹⁷

Again, after levying an assessment, should unexpected assets flow into the general fund, these would not be distributed, or any portion, among the stockholders until the creditors were fully paid.¹⁸

7. Dividends Among Different Classes of Stockholders.

Formerly, banks were established with different classes of stockholders, also ecclesiastical societies, having different rights and liabilities. As such banks no longer exist, or only a small

¹⁵ Wurtz v. Hart, 13 Iowa 515; American Nat. Bank v. Branch, 57 Kan. 27; Citizens' Bank v. State, 8 Kan. App. 468; National Union Bank v. National Mechanics' Bank, 80 Md. 371; Rogers v. Citizens' Nat. Bank, 93 Md. 613; Ga. Seed Co. v. Talmadge, 96 Ga. 254; Third Nat. Bank v. Eastern R. Co., 122 Mass. 240; Merchants' Nat. Bank v. Eastern R., 124 Mass. 518; Whittaker v. Amwell Nat. Bank, 52 N. J. Eq. 400; State v. Nebraska Sav. Bank, 40 Neb. 342; Winton v. Eldridge, 3 Head (Tenn.) 36; *In re Frasch*, 5 Wash. 344. This is the rule established by the federal bankruptcy act, July 1, 1898, Ch. 541, 30 Stat. 544. *In re Myers*, 99 Fed. 691; *In re Little*, 110 Fed. 621; *New York Co. Nat. Bank v. Massey*, 192 U. S. 138; *West v. Bank of Lahoma*, 85 Pac. (Okla.) 469.

¹⁶ An officer of the bank who sold his stock to it, knowing that it was deeply insolvent, was not entitled to a dividend on the amount the bank was to pay. *Columbian Bank's Estate*, 147 Pa. 422.

¹⁷ *Bacon v. Robertson*, 18 How. (U. S.) 480; *Lum v. Robertson*, 6 Wall. 277.

¹⁸ See *Pruyn v. Van Allen*, 39 Barb. (N. Y.) 354.

number, the peculiar effects or consequences of their failure to their stockholders need not be considered.¹⁹ Sometimes the debtors of a failed bank have made a settlement among themselves. These special arrangements involve no principles worthy of consideration.²⁰

8. Dividends by National Banks.

"Dividends are to be paid to all creditors ratably, that is to say, proportionally. To be proportionate they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated."²¹

A stockholder who receives and retains a dividend cannot afterwards question the validity of the liquidation.²² And a dividend should be paid to the real stockholders whether their names are recorded in the bank books or not.²³

When a dividend has been ordered and paid on some claims while others are in adjudication, the legality of which are afterward established, interest should be paid on them from the date fixed for paying the dividend until they are paid, in order to equalize the amounts received by all creditors.²⁴

An order should not be made directing the payment of interest by the receiver of a bank from the date of judicial demand, as funds coming to the receiver are turned over to the controller and cannot earn interest, the payment of it must necessarily be taken from some other trust fund.²⁵

9. Order of Payments.

In distributing the assets the expenses of administering the estate are first paid, next the creditors having priorities or preference, and, lastly, the general creditors.

We have already considered the claims of the various cred-

¹⁹ Stonington Bank v. Baptist Society, 38 Conn. 577.

²⁰ Conococheague Bank v. Ragan, 7 Gill & J. (Md.) 341.

²¹ White v. Knox, 111 U. S. 784, 786.

²² Watkins v. National Bank, 51 Kan. 254.

²³ Bath Sav. Institution v. Sagadahoe Nat. Bank, 89 Me. 500.

²⁴ Armstrong v. American Ex. Nat. Bank, 133 U. S. 433.

²⁵ Richardson v. Louisville Banking Co., 36 C. C. A. 307.

itors who have priorities by virtue of statutes, or implied trusts raised by the law in their favor. General creditors share ratably in the assets, the same percentage on the amount of their claims as finally allowed; after payment of those in the class above them. If the assets are insufficient to pay all the preferred creditors, then they also share ratably except so far as the statutes have discriminated among them.²⁶

26 Chaps. XXX. and XXXI.

CHAPTER XXXIII.

FORFEITURE AND REPEAL OF CHARTER.

1. Dissolution by limitation.	8. How state may deal with the * forfeiture.
2. Causes of forfeiture of charter.	9. Proceedings when charter is dis-
3. Direct proceedings are required.	solved by repeal.
4. Nature of proceeding.	10. Effect of repeal.
5. Power of bank after filing for-	11. Voluntary dissolution.
feiture process.	12. Dissolution by time.
6. Effect of forfeiture.	
7. Mode of proceeding by receiver.	

1. Dissolution by Limitation.

A bank may be dissolved by the efflux of time or by limitation; and by the common law all the rights and liabilities of stockholders and creditors perish.¹ The debts due to and from the corporation are all extinguished. Neither the stockholders nor the directors nor the trustees of the corporation can recover the debts or be chargeable with them as individuals.² Nor has the legislature any power to revive the rights of the creditors of a bank which has thus ended its existence.³

Since this is the common law, which is so contrary to the sense of justice and fair dealing, the charters of banks or gen-

¹ State Bank v. Duncan, 56 Miss. 166, Paschall v. Whitsett, 11 Ala. 472, 478. "The corporate right to sue, when not prolonged by statute for the purpose of winding up the affairs of the corporation, dies with the charter. There can be no suit by a dead person, whether natural or artificial. In this respect a dead corporation stands upon no better footing than a dead man." Simmons, Ch. J., Merritt v. Gate City Nat. Bank, 100 Ga. 147, 149.

² Coulter v. Robertson, 24 Miss. 278, containing an elaborate discussion of the subject. Commercial Bank v. Chambers, 8 Sm. & M. (Miss.) 9; Merrill v. Suffolk Bank, 31 Me. 57; Saltmarsh v. Planters' Bank, 17 Ala. 761; Greeley v. Smith, 3 Story (U. S.) 657. But the legislature may recognize in the act revoking a charter the continued existence of the stockholders and their liability for the debts of the corporation. Merrill v. Suffolk Bank, 31 Me. 57, 61.

³ State Bank v. Duncan, 56 Minn. 166.

eral statutes generally provide for continuing their existence so far as may be necessary on the one hand by banks to collect the indebtedness due to them, and on the other by creditors to obtain their just demands, and to institute and maintain the suits needful for this purpose.⁴

2. Causes of Forfeiture of Charter.

Formerly, banks came to an end before the established period by the forfeiture of their charters. The most frequent act which resulted so fatally was their failure to redeem their notes on demand of holders.⁵ Less frequent causes have been their failure to keep the requisite amount of specie on hand to redeem their notes,⁶ to issue them in excess of the legal limit,⁷ to exchange them for other bank notes;⁸ to pay their stock subscriptions in accordance with legal requirements;⁹ to pay their drafts and other liabilities;¹⁰ to hold annual meetings and elect officers;¹¹ to make improper and excessive loans and take excessive interest;¹² to neglect or refuse to make the annual reports or other statements required by law;¹³ and lastly, their failure to manage their business properly resulting in insolvency.¹⁴

It may be added that if a bank suspends business for several years and then resumes, the state can institute forfeiture pro-

4 See *Pomeroy v. State Bank*, 1 Wall. (U. S.) 592.

5 *State v. Commercial Bank*, 13 Sm. & M. (Miss.) 569.

6 *Commonwealth v. Bank*, 4 Allen (Mass.) 1.

7 *Bank v. State*, 1 Blackf. (Ind.) 267.

8 *Bank Commissioners v. Bank of Buffalo*, 6 Paige (N. Y.) 497.

9 *People v. City Bank*, 7 Colo. 226; *People v. National Sav. Bank*, 129 Ill. 618.

10 *Attorney-General v. Oakland Co. Bank*, Walk. Ch. (Mich.) 90.

11 *State v. Commercial Bank*, 33 Miss. 474.

12 *Bank Commissioners v. Bank of Buffalo*, 6 Paige (N. Y.) 497; *Commonwealth v. Commercial Bank*, 28 Pa. 383; *State v. Seneca Co. Bank*, 5 Ohio St. 171; *State v. Commercial Bank*, 33 Miss. 474.

13 *State v. Seneca Co. Bank*, 5 Ohio St. 171.

14 *People v. Hudson Bank*, 6 Cow. (N. Y.) 217; *Bank Commissioners v. R. I. Cent. Bank*, 5 R. I. 12. See *State v. Commercial Bank*, 13 Sm. & M. (Miss.) 569.

ceedings within a reasonable period after its resumption for the old offence.¹⁵

3. Direct Proceedings Are Required.

A charter is not forfeited without appropriate judicial proceedings; this cannot be done in any collateral action. It is a direct formal proceeding, emanating from the state and conducted by established principles. Until this is begun a bank can continue to act in its usual manner. National banks have been in danger of forfeiture for making loans on real estate security, and for lending to borrowers more than one-tenth of their capital and for other violations.¹⁶

4. Nature of Proceeding.

The proceeding is of a civil nature,¹⁷ and if begun by a state commission it is not needful to show that all authorized the proceeding.¹⁸ Stockholders may also act in some states,¹⁹ but creditors cannot.²⁰

A forfeiture can be declared only by a judicial proceeding; until this is done no one has a right to question in a collateral proceeding a bank's existence.²¹ But when a bank is guilty of an act that would justify the state in demanding the forfeiture of its charter, subsequent good conduct will not atone for the offense.²²

By the national banking law the forfeiture must be adjudged by a federal court in a suit brought for that purpose by the controller of the currency in his own name.²³

¹⁵ People v. Bank of Pontiac, 12 Mich. 527.

¹⁶ See Chap. VII. §19.

¹⁷ Commercial Bank v. State, 4 Sm. & M. (Miss.) 439, 504.

¹⁸ Bank Commissioners v. Bank, 6 Paige (N. Y.) 497.

¹⁹ Mitchell v. Bank of St. Paul, 7 Minn. 252.

²⁰ In Matter of Kuhn, 2 Ash. (Pa.) 170.

²¹ People v. Bank of Pontiac, 12 Mich. 527.

²² Ibid.; People v. Fishkill Plank Road Co., 27 Barb. (N. Y.) 445, 458; People v. Hillsdale Turnpike Road Co., 23 Wend. (N. Y.) 254; Matter of Jackson Marine Ins. Co., 4 Sand. Ch. (N. Y.) 559.

²³ Brinckerhoff v. Bostwick, 88 N. Y. 52, 57.

In a quo warranto proceeding the franchises and privileges alleged to be usurped need be set forth only in general terms. "It is always the right of the government to call upon those who assume corporate powers to require them to show by what warrant they do so."²⁴

5. Power of Bank After Filing Forfeiture Process.

After the proper officer has filed a bill to have a forfeiture declared, the court will restrain the bank on proper proof from continuing operations;²⁵ otherwise, it will continue to do business until the decree of forfeiture is entered.²⁶ Nor can a debtor defend any just liability on the ground that the bank has legally forfeited its charter until this has been formally decreed.²⁷

6. Effect of Forfeiture.

The effect of forfeiture is generally prescribed by statute, as it differs greatly from the effect of a common law forfeiture.²⁸ The liabilities in favor of, and against a bank, continue, and the requisite authority to enforce them is preserved.²⁹ Even if it cannot sue and be sued, the obligation of its contracts survive and may be enforced against any property belonging to the corporation that has not passed into the possession of a bona fide purchaser.³⁰ Consequently, the appointment of a receiver to distribute its assets among its home creditors does not prevent a non-resident creditor from attaching property in his own state belonging to the bank.³¹

24 Campbell, J., *People v. River Raisin R.*, 12 Mich. 389, 394.

25 Attorney-General v. Bank of Chenango, 1 Hop. Ch. (N. Y.) 596.

26 Attorney-General v. Bank of Niagara, Hop. Ch. (N. Y.) 354.

27 Farmers' Bank v. Garten, 34 Mo. 119.

28 Nevitt v. Bank, 6 Sm. & M. (Miss.) 513. A dissolution of a bank by legislative act deprives it of corporate existence and a legal judgment cannot be rendered thereafter against it. Crease v. Babcock, 10 Met. (Mass.) 525. See note, 50 Am. Dec. 652.

29 Ibid; Lum v. Robertson, 6 Wall. (U. S.) 277.

30 City Ins. Co. v. Commercial Bank, 68 Ill. 348; Mumma v. Potomac Co., 8 Pet. (U. S.) 281; Greeley v. Smith, 3 Story (U. S.) 657.

31 City Insurance Co. v. Commercial Bank, 68 Ill. 348. See also Chap. XXIX. §11.

7. Mode of Proceeding by Receiver.

The officer appointed to close a bank after its forfeiture is declared, proceeds in the same manner as in the case of an ordinary insolvent estate. He is not a public officer, but merely a trustee.³²

8. How State May Deal with the Forfeiture.

As a state is sovereign it need not take this step, and very often it suffers a bank to continue on promise or expectation of amendment. Occasionally a temporary injunction against a bank has been granted, which has been subsequently dissolved; and a judgment of forfeiture has been reversed and the bank has resumed. The legislature also can remit the forfeiture.³³

9. Proceedings When Charter is Dissolved by Repeal.

A bank may be dissolved by the repeal of its charter; nevertheless,³⁴ similar proceedings must be taken to have its forfeiture decreed as in other cases. When such an ending happens actions may be prosecuted to judgment against it and stockholders be subjected to the statutory liability for the bank's indebtedness. In such a preliminary action, however, any stockholder may seek its reversal without joining the others.

10. Effect of Repeal.

The repealing of the charter of a bank followed by its formal dissolution dissolves all the attachments in cases wherein final judgment has not been rendered.³⁵ But it is not dissolved by the expiration of the bank through legal limitation.³⁶ Fur-

32 People v. Ridgley, 21 Ill. 65; Commercial Bank of Natchez v. Chambers, 8 Sm. & M. (Miss.) 9.

33 Atchafalaya Bank v. Dawson, 13 La. 497; Nevitt v. Bank of Port Gibson, 6 Sm. & M. (Miss.) 513; State v. Bank of Charleston, 2 M'Mull. (S. C.) 439; State v. Real Estate Bank, 5 Pike (Ark.) 595.

34 Bowker v. Hill, 60 Me. 172.

35 Bowker v. Hill, 60 Me. 172; Farmers' & Mech. Bank v. Little, 8 Watts & Serg. (Pa.) 207.

36 Lindell v. Benton, 7 Mo. 361.

thermore, when a charter has been legally repealed, a creditor of the bank cannot interpose on the ground that such action would prevent the collection of his debt, which has been secured in a pending suit of attachment.³⁷ And a stockholder who has been sued, and whose property has been attached, may impeach the judgment if one is rendered against him, because the suit itself could have no legal existence.³⁸

11. Voluntary Dissolution.

The national banking law provides for the voluntary dissolution of the bank and so do some of the state laws. By the national law two-thirds of the stock may at any time vote to go into liquidation, whatever may be the wishes of the minority stockholders.³⁹

It may then do whatever is needful to close its affairs, sue and be sued, collect debts due and pay those it owes, and its officers have no authority to do anything except what is necessary to this end, without express authority of the stockholders. And if they all unite except one in organizing a new bank, he cannot complain of the sale of the assets to it when knowing of their disposition and accepting his share of the proceeds.⁴⁰

12. Dissolution by Time.

A bank may be dissolved by living out its appointed period. When it dies in this manner the legislature has no power to restore either the bank, or the rights of its creditors.⁴¹

37 Read v. Frankfort Bank, 23 Me. 318.

38 Whitman v. Cox, 26 Me. 335.

39 Rev. Stat. §5220.

40 Rev. Stat. §5221; Act of March 2, 1887, 2 Sess. 54 Cong., 29 Stat. at Large, Ch. 354.

41 After the expiration of its charter a national bank can sue and be sued until its affairs are completely settled. Farmers' Nat. Bank v. Backus, 74 Minn. 264; National Bank v. Insurance Co., 104 U. S. 54. In Alabama a stockholder of a bank who has not paid in full for his stock cannot be garnished by a creditor after its dissolution. Paschall v. Whitsett, 11 Ala. 472.

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